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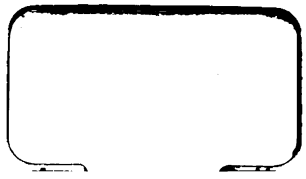

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BY

THEODORE SCHROEDER

ATTORNEY FOR THE FREE SPEECH LEAGUE

AUTHOR *"Obscene" Literature and Constitutional Law*, COMPILER *Free Press Anthology*, *Etc.*


FREE SPEECH LEAGUE
56 EAST 59TH ST.
NEW YORK
1912

# THE FREE SPEECH LEAGUE

At Albany, New York, on April 7, 1911, the Free Speech League was incorporated. The incorporators are; President, Leonard D. Abbott, associate editor of *Current Literature;* Vice-president, Brand Whitlock, mayor of Toledo, Ohio; Lincoln Steffens, leading progressive economist; Bolton Hall, author and lawyer; Gilbert E. Roe, law-writer; Treasurer, Dr. E. B. Foote, author of medical books; Secretary, Theodore Schroeder, author and lawyer. In the articles of incorporation the purposes of the Free Speech League are declared to be:

"The principal objects for which said corporation is formed are as follows, viz: By all lawful means to promote such judicial construction of the Constitution of the United States, and of the several states, and of the statutes passed in conformity therewith, as will secure to every person the greatest liberty consistent with the equal liberty of all others, and especially to preclude the punishment of any mere psychological offense; and, to that end, by all lawful means to oppose every form of governmental censorship over any method for the expression, communication or transmission of ideas, whether by use of previous inhibition or subsequent punishment; and to promote such legislative enactments and constitutional amendments, state and national, as will secure these ends." The officers are all unsalaried. If you are interested send a contribution to

THE FREE SPEECH LEAGUE,
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# Health and Freedom

*By Herbert Spencer*

FOR a dyspeptic, chicken-broth may be in all respects better suited than more substantial fare. And who so is suffering under an attack of influenza, will do wisely to avoid a blustering northwester, or a gentle breeze from the south. But he would be thought more than silly who inferred from such acts that solid food and fresh air are bad things. To ascribe any evil results to these, rather than to the unhealthy condition of the patients, would imply extremely crude ideas of causation. Similarly crude, however, are the ideas of those who infer that unlimited liberty of speech is improper, because productive in certain states of society of disastrous results. It is to the abnormal condition of the body politic that all evils arising from an unrestrained expression of opinion must be attributed, and not to the unrestrained expression itself.

I

# OUR VANISHING LIBERTY OF THE PRESS

Republished from *The Arena, Dec. 1906*

FOR OVER a century it has been believed that we had abolished rule by divine right, and the accompanying infallibility of officialism, and that we have maintained inviolate the liberty of conscience, of speech and of press. However, this belief of ours is fast becoming a matter of illusion. Though a love for such liberty is still verbally avowed, yet in every conflict raising an issue over it, it is denied in practice. There is not a state in the Union to-day, in which the liberty of the press is not abridged upon several legitimate subjects of debate. Here will be discussed but one of these, and that perhaps the most unpopular.

By gradual encroachments and unconscious piling of precedent upon precedent, we are rapidly approaching the stage in which we will enjoy any liberties only by permission, not as a matter of right. In this progressive denial of the freedom of conscience, speech and press, all three branches of government have transgressed, without seriously disturbing the serene, sweet, century-long slumber, into which we are lulled, by the songs of liberty, whose echoes still resound in our ears, but whose meaning we have long since forgotten.

A century ago we thought that we had settled all these problems of liberty. In all our constitutions we placed a verbal guarantee of liberty of speech and press, and then stupidly went to sleep, assuming that the Constitution had some mysterious and adequate potency for self-enforcement. This is the usual mistake, always so fatal to all liberties, and the multi-

tude is too superficial and too much engrossed with a low order of selfish pursuits to discover that constitutions need the support of a public opinion which demands that every doubtful construction shall be resolved against the state and in favor of individual liberty.

In the absence of such construction, constitutions soon become the chains which enslave, rather than the safeguards of liberty. Thus it has come that under the guise of "judicial construction," all constitutions have been judicially amended, until those who, by a dependence upon the Constitution, endeavor to defend themselves in the exercise of a proper liberty, only make themselves ridiculous. Persons finding satisfaction or profit in repudiating constitutional guarantees, and combining therewith sufficient political power to ignore them with impunity, unconsciously develop in themselves a contempt for the fundamental equalities which most founders of republics sought to maintain. This contempt is soon shared by those who find themselves the helpless victims of misplaced confidence in constitutions, and through them is transfused to the general public, until that which we should consider the sacred guarantee of our liberties becomes a joke, and those who rely upon it are looked upon as near to imbecility.

Some years ago a United States Senator (Mr. Cullom) was reported as saying that "in the United States there is no constitution but public opinion." We should also remember the unconscious humor which made Congressman Timothy Campbell famous. He was urging President Cleveland to sign a bill which had passed Congress and the latter objected because he believed the bill to be violative of the organic law. Our ingenious statesman broke in with this earnest plea: "What's the Constitution as between friends?" General Trumbull once said: "The Constitution has hardly any existence in this country except as rhetoric. . . . By virtue of its sublime promise to establish justice, we have seen in-

justice done for nearly a hundred years. It answers very well for Fourth-of-July purposes, but as a charter of liberty, it has very little force." In Idaho, at the time of the official kidnapping of Moyer and others in Colorado, the attorney of these men tried to show the court the unconstitutionality of the procedure, when the baffled rage of the judge prompted him to exclaim: "I am tired of these appeals to the Constitution. The Federal Constitution is a defective, out-of-date instrument, anyhow, and it is useless to fetch that document into court. But Constitution or no Constitution, we have got the men we went after; they are here; they are going to stay here until we have had our final say, and I would like to know what is going to be done about it?" No wonder that the wise Herbert Spencer wrote: "Paper constitutions raise smiles on the faces of those who have observed their results."

All this is true because the great mass are indifferent to the constitutionally-guaranteed liberties of others, and so allow sordid self-interest and bigotry to add one limitation after another, until all freedom will be destroyed by judicial amendments to our charters of liberty. Furthermore, to most persons, the word liberty is only an empty sound, the meaning of which they know not, because they have never learned the reasons underlying it. Thus they are too stupid to be able to differentiate between their disapproval of an opinion and their opponent's right to disagree with them. They love their own power to suppress intellectual differences more than another's liberty of expressing them, and more than the progressive clarification of human conceptions of truth, which can only come through freedom of discussion. Such persons specially owe to themselves, and to those against whom they are encouraging injustice, that they should read the defenses of liberty as made by the master-minds of the past.

That the state is a separate entity is a mere fiction of the law, which is useful within the very narrow

limit of the necessities which called it into existence. This is judicially recognized by our courts and by thoughtful laymen. By getting behind the fiction, to view the naked fact, we discover that the state has no existence except as a few fallible office-holders, theoretically representing the public sentiment, expressing its power, sometimes doing good and often thriving on the ignorance and indifference of the masses. When we abolished the infallibility of rulers by divine right, we at the same time abolished the *political duty* of believing either in God or what was theretofore supposed to be his political creation, the State.

Henceforth government was to be viewed only as a human expedient, to accomplish purely secular human ends, and subject to be transformed or abolished at the will and discretion of those by whose will and discretion it was created and is maintained. The exclusively secular ends of government were to protect each equally in life, liberty, and the pursuit of happiness. So the fathers of our country in their Declaration of Independence wrote that: "Whenever any form of government becomes destructive of these ends, it is the right of the people to alter *or abolish it.*" Similar declarations were made by the separate colonies. Thus the Pennsylvania Declaration of Rights contains these words: 'The community hath an indubitable, inalienable, and indefeasible right to reform, alter *or abolish,* government, in such manner as shall be by that community judged most conducive to the public weal." In harmony with these declarations we made laws, such that political offenders, though they had been in open revolt to a tyrannous foreign government, or had slain the minions of the tyrant, might here find a safe retreat from extradition.

All this has passed away. Formerly it was our truthful boast that we were the freest people on earth. To-day it is our silent shame that among all the tyrannical governments on the face of the earth

ours is probably the only one which makes the right of admission depend upon the abstract political opinions of the applicant. Our people denounce the unspeakable tyranny of a bloody Czar, and pass laws here to protect him in the exercise of his brutalities in Russia. Instead of being "the land of the free and the home of the brave" we exclude from our shores those who are brave and seek freedom here, and punish men for expressing unpopular opinions if they already live here. In vain do the afflicted ones appeal to a "liberty loving" populace for help in maintaining liberty.

In this short essay I can discuss specifically only the denial of liberty of conscience, speech, and press, as it affects one class of citizens, and I choose to defend the most despised.

Under our immigration laws no anarchist, that is, "no person who disbelieves in or who is opposed to all organized governments" is allowed to enter the United States, even though such person be a non-resistant Quaker. In other words, the persons who believe with the signers of the Declaration of Independence that those who create and maintain governments have a right to abolish them, and who also desire to persuade the majority of their fellow-men to exercise this privilege, are denied admission to our national domain.

Of course that and kindred legislation was the outgrowth of the most crass ignorance and hysteria, over the word "anarchist." I say most crass ignorance deliberately, because to me it is unthinkable that any sane man with an intelligent conception of what is believed by such non-resistant anarchists as Count Tolstoi, could possibly desire to exclude him from the United States. It almost seems as though most people were still so unenlightened as not to know the difference between socialism, anarchism, and regicide, and so wanting in imagination that they cannot possibly conceive of a case in which the violent resistance or resentment of tyranny might be-

come excusable. Thus it is that the vast multitude whose education is limited to a newspaper intelligence, stupidly assume that no one but an anarchist could commit a political homicide, and that every anarchist of necessity condones every such taking of human life. Nothing of course could be farther from the fact, but out of this ignorance it comes that every attempt at violence upon officials is charged against anarchists even before it is known who the perpetrator was, and without knowing or caring whether he was an anarchist, a socialist, an ordinary democrat, a man with a personal grudge, or a lunatic. From such foundation of ignorance comes the result that we punish those who disagree with the English tyrant of a couple of centuries ago, who said that the worst government imaginable was better than no government at all.

For the benefit of those whose indolence precludes them from going to a dictionary to find out what "anarchism" stands for I will take the space necessary to quote Professor Huxley on the subject. He says:

"Doubtless, it is possible to imagine a true 'Civitas Dei,' in which every man's moral faculty shall be such as leads him to control all those desires which run counter to the good of mankind, and to cherish only those which conduce to the welfare of society; and in which every man's native intellect shall be sufficiently strong and his culture sufficiently extensive to enable him to know what he ought to do and to seek after. And in that blessed state, police will be as much a superfluity as every other kind of government. . . . Anarchy, as a term of political philosophy, must be taken only in its proper sense, which has nothing to do with disorder or with crimes; but denotes a state of society, in which the rule of each individual by himself is the only government the legitimacy of which is recognized. Anarchy, as thus far defined, is the logical outcome of the form of political theory which, for the last half-century and

more, has been known under the name of Individualism."

And men who merely believe this beautiful ideal attainable are unfit for residence in a land that boasts of freedom of conscience and press!

If the distinguished and scholarly author of the *Life of Jesus,* M. Ernest Renan, should be Commissioner of Immigration, he would, under present laws, be compelled to exclude from the United States the founder of Christianity, should He seek admission.

In his *Life of Jesus,* Renan expresses this conclusion: "In one view Jesus was an anarchist for he had no notion of civil government, which seemed to him an abuse, pure and simple. . . . Every magistrate seemed to him an abuse, pure and simple. . . . seemed to him a natural enemy of the people of God. . . . His aim is to annihilate wealth and power, not to grasp them."

If the Rev. Heber Newton were Commissioner of Immigration, he, too, would have to exclude Jesus from our land as an anarchist. Dr. Newton says: "Anarchism is in reality the ideal of political and social science, and also the ideal of religion. It is the ideal to which Jesus Christ looked forward. Christ founded no church, established no state, gave practically no laws, organized no government and set up no external authority, but he did seek to write on the hearts of men God's law and make them self-legislating."

Surely people who only ask the liberty of trying to persuade their fellow-men to abolish government, through passive resistance, cannot possibly be a menace to any institution worth maintaining, yet such men we deny admission into the United States. If they chance to be Russians, we send them back, perhaps to end their days as Siberian exiles, and all because they have expressed a mere abstract "disbelief in government," though accompanied only by a desire for passive resistance.

Julian Hawthorne wrote this: "Did you ever no-

tice that all the interesting people you meet are Anarchists?" According to his judgment, "all the interesting people" would, under present laws, be excluded from the United States. An industrious commissioner, zealous to enforce the law to the very letter, could easily take the writings of the world's best and greatest men, and if foreigners, on their own admissions, could exclude them because they had advocated the anarchist ideal of a "disbelief in government." Among such might be named the following: Count Leo Tolstoi, Prince Peter Kropotkin, Michel Montaigne, Thomas Paine, Henry Thoreau, Lord Macaulay, William Lloyd Garrison, Hall Caine, Turgot, Simeon of Durham Bishop of St. Andrews, Max Stirner, Elisée Reclus, Frederick Nietzsche, Thomas Carlyle, Horace Traubel, Walt. Whitman, Elbert Hubbard, Samuel M. Jones, Henrik Ibsen, Joseph Proudhon, Michael Bakunin, Charles O'Conor, and probably also Ralph Waldo Emerson, Thomas Jefferson, Herbert Spencer, John Stuart Mill, and—but what's the use? They can't all be named.

These are the type of men who hold an ideal, only a dream perhaps, of liberty without the invasion even of government, and therefore we make a law to exclude them from the United States. But that is not all we do in this "free" country. If a resident of this "land of the free" should "connive or conspire" to induce any of these non-resistants, who "disbelieve in governments," to come to the United States, by sending one of them a printed or written, private or public, invitation to visit here, such "conspirer" would be liable to a fine of five thousand dollars, or three years' imprisonment, or both. And yet we boast of our freedom of conscience, of speech and of press!

It is hard for me to believe that there is any sane adult, worthy to be an American, who knows something of our own revolutionary history, who does not believe revolution by force to be morally justifiable under some circumstances, as perhaps in Russia, and

who would not defend the revolutionists in the slaughter of the official tyrants of Russia, if no other means for the abolition of their tyranny were available, or who would not be a revolutionist if compelled to live in Russia and denied the right to even agitate for peaceable reform. And yet "free" America, by a congressional enactment, denies admission to the United States of any Russian patriot who agrees with us in this opinion, even though he has no sympathy whatever with anarchist ideals. It is enough that he justifies (even though in open battle for freedom) the "unlawful" killing of any tyrant "officer" of "any civilized nation having an organized government." Here, then, is the final legislative announcement that no tyranny, however heartless or bloody, "of any civilized nation having an organized government" can possibly justify violent resistance. It was a violation of this law to admit Maxim Gorky into this country, though he is not an anarchist.

In the state of New York, although satisfied with American conditions and officials, and although you believe in democratic government, if you should orally, or in print, advocate the cause of forcible revolution against Russia, or against "any civilized nation having an organized government," you would be liable, under a state statute, to a fine of $5,000 and ten years' imprisonment besides. Have we, then, freedom of conscience, speech and press. Do we love liberty or know its meaning?

Yes, it may be that a dispassionate and enlightened judge must declare such laws unconstitutional, but such judges are as scarce as the seekers after martyrdom who are willing to make a test case. Hence we all submit to this tyranny. Furthermore, the same hysteria which could make legislators believe they had the power to pass such a law, in all probability would also induce courts to confirm such power. A Western jurist, a member of the highest court of his state, once said to me that it must be a very stupid lawyer who could not write a plausible

opinion on either side of any case that ever came to an appellate court. Given the mental predisposition induced by popular panic, together with intense emotions, and it is easy, very easy, to formulate verbal "interpretations" by which the constitutional guarantees are explained away, or exceptions interpolated,—a common process for the judicial amendment of laws and constitutions.

If, then, we truly believe in the liberty of conscience, speech and press, we must place ourselves again squarely upon the declaration of rights made by our forefathers, and defend the right of others to disagree with us, even about the beneficence of government.

As when your neighbor's house is on fire your own is in danger, so the protection of your liberty should begin when it is menaced by a precedent which attacks your opponent's equality of opportunity to express his disagreement with you. Let us then unite for the repeal of these iniquitous laws, born of hysteria and popular panic, and maintained in thoughtless disregard of others' intellectual freedom.

II

# THE LAWLESS SUPPRESSION OF FREE SPEECH IN NEW YORK

Republished from *The Arena, June, 1908*

EVEN the average "intelligent" American citizen can see why a reign of terror exists in Russia. We all understand that as between the nobility and peasants there exists a difference of opinion, as to the justice of their system of land-holding, taxation, and economics generally, as these are established by "law," so-called. The peasants desire to discuss their grievances and the remedies therefore. Their utterances are suppressed by a brutal and arbitrary censorship. No orderly method of securing redress being open to them, in desperation they resort to violence, in personal revenge for the wrongs they believe themselves to suffer. Every increase in official repression of free speech results in, and justifies, a corresponding increase in terrorism. We generally see this to be true, *in Russia,* and seeing it we quite instinctively understand that if peace and order were really desired by the ruling class the remedy is to withhold repression, give every one a chance to air his grievance, then reëxamine the established system and honestly try to discover and remove the legalized injustices, if any are found to exist. The man who has advocated violence feels relieved, and is less impelled to commit it, than the fellow who broods over this suppression of his speech about the injustice which he thinks he suffers. In other words, the remedy for terrorism, *in Russia,* lies in removing the justification and necessity for it; that is, in establishing entire freedom of speech

and of the press, and after opportunity of hearing all complaints, no matter how irrational, satisfy the public sense of fair play, by honestly trying to establish a more just *régime*.

But the average "intelligent" American seems unable to see that human nature is quite the same in America as it is in Russia, and that allowing our police and post-office authorities lawlessly to suppress the freedom of speech and of the press, we are thoughtlessly giving the greatest possible provocation toward the establishment of a reign of terror in America. If the present official lawlessness shall continue at the present rate, to increase its arbitrary and brutal abolition of the freedom of speech and of the press, in less than twenty-five years the United States of America will present a reign of terror infinitely worse than that which now obtains in Russia. It will be infinitely worse because our population is more intelligent and less scattered, which conditions will facilitate the activities of terrorists. Already in many, if not most, states we have frequent personal violence, often against public officials, which violence was prompted by a conviction that justice is deaf and blind, even when appealed to, and in many cases the opportunity to make that appeal has been lawlessly denied.

Fellow-citizens, if that reign of terror comes, the responsibility for it rests with you, if you have not done all in your power to maintain inviolate, even as against the police force, the fullest freedom of speech and of the press even for the most obnoxious opinions of our most despised neighbors. Here, as in Russia, the preventive of a reign of terror is more liberty and more justice—the most forceful provocative of terrorism and personal revenge is the forcible maintenance of legalized injustice, or what is claimed to be such, while at the same time suppressing complaints, as we are now doing by the lawless, or even legalized, violence of a rowdy police organization, one of whose captains

recently boasted that his club was bigger than the Constitution. If we except religion, England probably has the greatest freedom of speech of any country in the world, and it is almost the only one in which there have been no plots to assassinate its rulers. In Russia we have the most active censorship over political opinion, and the greatest number of assassinated officers. Which shall we imitate? The present tendency is to follow the example of Russia, and I desire to make a record of a very few of the facts which lead me to that conclusion.

Miss Goldman's first arrest occurred in December, 1894, for a speech made to a gathering of workingmen. She was convicted of inciting a riot, though no riot occurred, and was sent to jail for six months. According to the publications of the time I conclude that the offensive portion of her speech consisted only in this: She quoted from an article by Cardinal Manning, published in the *Fortnightly Review,* wherein he said: "Necessity knows no law, and a starving man has a natural right to his neighbor's bread." She supplemented this with her own words as follows: "Ask for work; if they do not give you work, ask for bread; if they do not give you work or bread, then take bread." I doubt if any sane man really believes that another's law-created property-right in bread is more sacred than is his own natural right to live. Does any one believe that the duty to suicide by starvation, in the presence of a stealable plenty to be stronger than the duty of self-preservation by theft when that is the only alternative? I believe Cardinal Manning and Miss Goldman told self-evident truths, which were no injury to any one because none acted upon her suggestion, and yet, she went to jail six months therefor, which I deem an outrage.

This is the only time Miss Goldman was ever convicted of any offense, even against unconstitutional laws invading the freedom of speech. However, I am told by a friend of hers that she has since been

arrested nearly forty times and detained from one hour to several days, or for several months at a time has been under bail. Many of these arrests did not even eventuate in a judicial hearing. Never has she been charged by any one with having used violence upon any one, or interfered with the property of another, nor has there ever been one scintilla of evidence that violence was ever committed upon her advice, nor has any one so far as I can learn, ever offered any evidence of any more violent speech than the one quoted. And yet see the reputation which conscienceless officials and newspapers have given her. On some arrests a preliminary hearing was had and resulted in a discharge because her utterances were not even a violation of the unconstitutional anti-anarchist laws of New York. Some of these arrests were for speeches actually made, more of them were for merely threatening to make a speech, and sometimes when neither of these facts existed she was arrested simply because she was Emma Goldman and had an undeserved newspaper reputation. As to the last I must give one detailed illustration as the same has been reported to me. Miss Goldman was accompanying a friend to a railroad station. The friend carried a suit-case. A detective saw her and in his disordered imagination she could not possibly be with another person having a suit-case unless there was a conspiracy to murder some one. Furthermore, such persons could not have a suit-case in their possession except for the purpose of carrying bombs. So the "bold" detective, without a warrant and no doubt feeling that his life would be ended if the suit-case were ever dropped, arrested the pair. At the police-station, without a search warrant, which could only be issued upon evidence of probable cause, the suit-case was examined, and the imaginary bombs had disappeared. The pair were discharged, a train was missed and a day's delay occasioned, but the government had been saved, by an inexcusable arrest, the newspapers had head-

lines and no doubt thousands of fool people thought a President's life had been saved. Besides this, Emma Goldman's undeserved reputation had received an addition which in the public hysteria would justify any number of future lawless invasions of her liberty, whenever detectives wish to divert the public attention from impending investigations of police graft.

But I must return to the lawless suppression of free speech which has come about through the silly but popular panic whenever Emma Goldman's name is mentioned, which panic cannot be explained by any overt act of hers, but the whole of which has been manufactured by the falsehoods based upon the hysterical fears and morbid imagination of ignorant officials, and spread by conscienceless sensation-hunters on the "yellow" press. At a public meeting I once heard Miss Goldman criticized because, by her mildness she had disappointed her critic. In closing the discussion, with a smile she retorted: "A man stupid enough to believe all that he sees in print about me will always remain disappointed, because it is impossible for me to live up to my reputation."

This much was necessary to explain how unwarranted is the sentiment which upholds this lawless suppression of Emma Goldman's speech. But this police lawlessness is not limited to her. For the evening of December 14, 1906, I was invited to address the Liberal Art Society, which is not an anarchist organization. Because of the many lawless interferences with the freedom of speech of anarchists, I chose to defend their right to be heard and tc question the constitutionality of the anti-anarchist laws of New York. The manager of the lecture course informed me, a few days before the appointed time, that the captain of police in his precinct had threatened him with arrest should he permit me to deliver such a lecture as I had proposed, or allow any one to discuss any phase of anarchism. The manager thereupon changed my subject.

For January 24, 1907, a mass meeting was called in Everett Hall, New York City, to discuss the inexpediency and unconstitutionality of the "criminal anarchy" statute of New York. Mr. Bolton Hall, myself and two anarchists were advertised to speak. The police went to the lessor of the hall, so he said, lawlessly threatened him with arrest and a revocation of his license to conduct a hall for public gatherings, if he should allow us to execute our intention to speak for the repeal and judicial annulment of the anti-anarchist statue. The hall-owner became frightened. He could not afford to antagonize the police, so he refunded the rent and besides that paid the expenses of advertising, etc., but refused to allow the meeting to be held. So it has come to this that a lawless and arbitrary police commissioner in New York City, without even the justification of an unconstitutional statute, prohibits citizens, who are not anarchists, from making an address in a hall rented for that purpose, in which address it was simply proposed to argue that a recent statute should be repealed, or judicially declared to be unconstitutional. Thus the American slaves and cowards sit quietly by while citizens are deprived of even the right to discuss the meaning of our constitutional guarantee of freedom of speech, and while they are denied an opportunity to hear complaints about existing official lawlessness.

On December 26, 1906, I sent the following letter to the head of the police department. It has not yet been answered, except by a repetition of the lawlessness therein complained of, and this without protest from a populace, more reconciled than "ignorant" Russian peasants to be governed by the lawless use of a policeman's club. The letter is worthy of publication at this time, because of its recitals, and because the recent bomb incident in Union Square is a fulfilment of its prophecy.

"December 26, 1906.

"General Theodore A. Bingham,

"Commissioner of Police, New York City:

"*My dear General Bingham—*

"I have your esteemed favor of December 12, 1906, and note that you say, 'There is no intention in this department to interfere, except when laws and ordinances are violated.' I do not doubt that this is your personal intention, but it has not heretofore been acted upon by your subordinates. I call your attention to specific cases. The Manhattan Liberal Club meets at 220 East Fifteenth Street. The club as such has nothing to do with anarchism. It conducts a lecture platform with opportunity for free discussion of the lecture topics. Owing to this chance for propaganda, anarchists often attend to avail themselves of the privilege to discuss their pet hobby.

"At the door liberal and radical literature is sold, and among other matter *Mother Earth,* a magazine published by Emma Goldman. I am informed that your policemen have threatened the managers of the club, who are not anarchists, with arrest and a dispersal of their meeting if they allowed *Mother Earth* to be kept on sale there. This threat, I am told, was made specific as to all future numbers of the magazine, the prospective contents of which no policeman could know, and which, of course, cannot in advance be determined to be a violation of any law. I am unable to find any statute or ordinance which authorized your department thus to suppress a club not composed of anarchists, for having in its hall literature that in itself violates no law. *It is precisely such police lawlessness as this which breeds anarchists of the violent type.* Had you not better inquire a bit about this lawless interference with the rights of citizens by your subordinates, and thus make your expressed intention operative in the department?

"A second case of police lawlessness of a similar

sort arose out of the following facts. After the Haymarket killing of police in Chicago a number of anarchists were given life sentences on conviction of complicity. Later they were pardoned by the Governor of Illinois. In the lengthy pardoning message he made an exhaustive analysis of the evidence and reached the conclusion that all these convicts were innocent of the crime charged. His conclusion was not based upon a difference of opinion with the jury or trial court as to the preponderance of the evidence, but by a careful analysis showing that there was in fact not a particle of evidence directly connecting them with the offense.

"Under these circumstances the anarchists—not without reason, be it observed— infer that the conviction was the result of popular panic over anarchism, and that those who the governor said were convicted without evidence, served several years' imprisonment as 'martyrs for entertaining unpopular opinions.' I submit that it is their right to so regard them, and publicly to express the convictions of the Governor of Illinois.

"I am informed that for many years it has been the custom of anarchists and some other organizations, here and elsewhere, to hold some sort of memorial meeting in commemoration of this alleged martyrdom. Never until this year, under your administration, have these meetings been interfered with in New York City.

"This year I am informed that a line of policemen barred the entrance to the hall where it was proposed to hold this meeting. The reason assigned was simply that no meeting of anarchists would be permitted, even for a lawful purpose. Of course, no policeman possesses the occult power of reading in advance the minds of those who were expected to deliver addresses. Without such power of mind-reading no policeman could know in advance that any forbidden utterance would be indulged in. If your subordinates may thus with impunity and law-

lessly prevent assemblages of anarchists on suspicion, as to future events, they have the same right on like suspicion to close churches.

"On two recent occasions the Brooklyn police likewise assumed to do some mind-reading and excluded persons from a hall where they came to hear a lecture. I can find nothing which makes it unlawful for any particular persons to hold meetings for purposes in themselves lawful. It seems to me that it is up to you either to find such a law, or to withdraw your statement that there is no intention to interfere except under the law, or to discipline your officious, lawless subordinates.

"I can find no power in the statutes authorizing any such performance. If my information as above set forth is correct, then I do not hesitate to say that the conduct of your subordinates was as much a matter of lawlessness as the killing of Chicago policemen which is charged to anarchists.

"I submit to you, my dear sir, that your love of fair play and your desire to preserve order should induce you to make some inquiry within your department, to the end *that your men may not by their own lawless conduct provoke to violence those who may rightfully feel themselves thus wrongfully oppressed, but who are naturally peacefully disposed.*

"I assure you I write only in the interest of that freedom of speech and press which I believe to be guaranteed by our Constitution, which it is your business as police commissioner, and my business as a member of the bar, and as attorney for the Free Speech League, to uphold.

"Hoping that in my desire to be of service to you I have not allowed myself unduly to trespass upon your time by an over-long document, I remain,

"Most cordially yours,

"Theodore Schroeder."

Just a few words as to the sequel in Union Square, March twenty-eighth, which is a fulfilment of my prophecy to General Bingham, that suppres-

sion of free speech conduces to violence. Briefly the facts are these. A permit had been secured for a meeting of the unemployed to be held in Union Square, and it was advertised. Later the permit was withdrawn, not for public reasons that would operate against all meetings at that time and place, but because of the Park Commissioner's objections to this particular meeting which was to be addressed by socialists. The crowd gathered, were denied opportunity to hear speeches and clubbed out of the park—"the nightsticks swung with deadly precision." The bomb was thrown, and the man said to have thrown it, according to the New York *Times*, March 29, 1908, gave these as his reasons: "Yes, I made the bomb and I came to the park to kill the police with it. The police are no good. *They drove us out of the park, and I hate them.*"

Thus it happens that the unjust denial of equal opportunity for freedom of speech, was the immediate provocation for the bomb-throwing. And so strangely do dull minds work that the Park Commissioner whose revocation of the permit evidently provoked to murderous assault actually deems the killing which was provoked by his act a justification for it. Friends, in America as in Russia, the preventive of terrorism is to be found in greater freedom of speech, and more earnest and honest effort to discover and remove legalized injustice. By freedom of speech I do not mean the right to agree with the majority, but the right to say with impunity anything and everything which any one chooses to say, and to speak it with impunity so long as no actual material injury results to any one, and when it results then to punish only for the contribution to that material injury and not for the mere speech as such.

The thought that the greatest liberty of speech, even as to "violent" language, is the best way to avert actual violence is not original with me. It is as old as the controversy for intellectual freedom.

For those whose tyrannical dispositions will not allow them to acknowledge freedom of utterance as a right, I quote a few paragraphs which may persuade them to allow others, as a privilege of expediency, those rights which once were thought to be guaranteed to all Americans by our constitutions, but which our courts and a brutal police-force have destroyed in spite of our constitutions.

"Philip II. of Spain said that a king was never more secure from the malice of his people than when their discontents were suffered to evaporate in complaint. (1 Wraxall's Fr. 96.) Socrates said the sun could as easily be spared from the universe as free speech from the liberal institutions of society. (*Apud Hob. Eth.* XIII.) * * *

"Quetelet (*'sur l'homme'* 289) said that the press tends to deprive revolutions of their violence by hastening the reaction. * * *

"One great advantage of a free press is, that it tends to disperse the dangers that culminate in sedition. Bacon said that the surest way to prevent sedition, if the times do bear it, is to take away the matter [cause] of them. (41 Parl. Deb. 1591.) A great writer has also observed that 'Violence exerted towards opinions which falls short of extermination, serves no other purpose then to render them more known, and ultimately to increase the zeal and number of its abettors.' "—*Liberty of the Press, Speech and Public Worship,* by Patterson, pp. 4-41-79.

Robert Hall, who over a century ago wrote in defense of liberty, among many good things, said this:

"When public discontents are allowed to vent themselves in reasoning and discourse, they subside into a calm; but their confinement in the bosom is apt to give them a fierce and deadly tincture. The reason of this is obvious. As men are seldom disposed to complain till they at least imagine themselves injured, so there is no injury which they will

remember so long, or resent so deeply, as that of being threatened into silence. This seems like adding triumph to oppression, and insult to injury. The apparent tranquillity which may ensue, is delusive and ominous; it is that awful stillness which nature feels, while she is awaiting the discharge of the gathered tempest. * * *

"If the government wishes to become more vigorous, let it first become more pure, lest an addition to its strength should only increase its capacity for mischief."—*An Apology for the Freedom of the Press and for General Liberty,* pp. 21-22.

"When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface;—but pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe."—*Speeches of the Hon. Thomas Erskine,* Vol. II, p. 141, edition of 1810.

*P. S.* This essay was written and published before the Hon. Wm. J. Gaynor became the Mayor of New York City. Since then he has seen to it that the grosser abuses as herein complained of have been discontinued.

## III

# ON SUPPRESSING THE ADVOCACY OF CRIME

(From the stenographic report of a lecture.)

THE ever growing complexity of our social organism, with its creation of new relations and new conditions of human existence, constantly requires the re-interpretation and unprecedented application of our constitutionally guaranteed liberty. In making these new interpretations and applications, the judicial, as well as the popular mind, is prone to read into the Constitution its own prejudices, superstitions, or personal and class interests. It is the purpose of this discussion to discover the essential and fundamental, rather than the superficial, elements of these problems as they relate to our guarantee for liberty of speech and press.

Under the pressure of misconceptions, arising wholly from the superficial aspects of the problem, it has come to pass that in almost every controversy arising from an exercise of the liberty of speech and press, the official action has been in favor of its abridgment. The total absence of any serious protest against these denials demonstrates how the thoughtless public is incapable of seeing that the liberties of speech and press are the foundations of all other liberty; and, that by permitting them to be frittered away, all other liberty is being endangered.

In our military possession of the Philippine Islands we find executive authorities arresting an American editor for republishing our own Declaration of Independence. The excuse offered was that the Declaration of Independence would tend to in-

cite Filipinos to insurrection; since, not illogically, they might conclude that we ourselves, in our government of them, were repudiating our own declaration about liberty and denying a fundamental liberty of theirs.

In Porto Rico we find an American editor subjected to seventy or more arrests, and, finally, in practical effect, banished from the island as the one condition under which he could escape what might prove life imprisonment. His offense consisted only in publishing what he believed to be true concerning some carpet-bag officials, appointed by the President. We have heretofore been led to believe that one might tell the truth from good motives; but, in the case of this editor, the court denied him an opportunity of proving his allegations to be true. These officials, though acting under the Constitution of the United States, assumed to set aside the provision guaranteeing freedom of speech and press, on the pretext that, to discredit American officials would promote insurrection among native Porto Ricans. The authorities in Washington were not sufficiently imbued with any love for liberty to even induce a reprimand of the petty officials, who had undertaken thus to amend the Federal Constitution.

Another vicious infringement of liberty has grown out of the development of our government by injunction. In labor difficulties, very frequently, we find courts issuing injunctions against strikers, which, under the pain of imprisonment, prohibit them from talking with the strike breakers, or even from walking upon the streets adjacent to their former places of employment. Here again the infringement of freedom of speech, by judicial injunction, would probably be justified, by those who can justify it, with the statement that such conversation might lead to a conspiracy in the restraint of trade, should the new employee decide to join the strikers. In passing it is worthy of note that no injunction is

ever issued against employers to restrain them from conversation with one another, because it might lead to agreements in restraint of competition as employers.

In Idaho a few years since many striking miners were herded in outrageously unsanitary "bull-pens" by the militia of the State. An editor, who foolishly believed the Constitution of Idaho to be of some importance, propounded some questions in his paper, calculated to bring out that this conduct of the militia was unauthorized by law and in violation of law. For asking these questions, as to the source of the authority for the military conduct, he was also arrested and placed in a "bull-pen" with the others. Here, again, a petty official, deriving his sole authority under the Constitution, assumed to set it aside, primarily because another in the exercise of his freedom of the press, guaranteed by the Idaho Constitution, was personally offensive to this official. Perhaps those intelligent enough to frame a defense for such conduct would justify the abridgment of freedom by saying that such publication would tend to encourage resistance to the authority of the militia. It never seems to occur to those in power that others may properly inquire into the sufficiency of their authority and rightfully resist, even to the taking of life, if necessary, the exercise of power by persons holding office, when no adequate authority for its exercise can be found in the laws and Constitution.

Similarly we find in Colorado, at the time of the recent labor disturbances, that a Socialist editor was promptly arrested for exercising his right of freedom of press in criticism of local military authorities. Still insisting that he had the constitutional right to express whatever opinion he saw fit, about the conduct of military officials, the celebrated general, in charge of the official outrages, considered that he had sufficiently denied the right of the editor by saying, "to hell with the Constitution."

Another most clear instance of a denial of freedom of speech and press is in the laws which have for their avowed object the suppression of obscene literature. We are now suppressing serious scientific discussions of the physiology, hygiene, ethics and psychology of sex, as well as some sane advocacy of unpopular opinions about the sociologic problems arising from sex. This is done, because in the unhealthy minds of some persons the epithet "obscene" can be applied to such books. The pretense is made that such books promote sexual immorality, and they are suppressed sometimes where that dreaded immorality is not even a statutory offense, and where the sole purpose of the suppressed print is to inquire if some conduct, lauded as moral, is not in fact immoral.

Another, and in some respects the most dangerous invasion of liberty of press, has developed out of a constructive contempt of court. With the abolition of government by divine right, we came to believe that we might with propriety criticise the official conduct of every public servant. However, since in contempt proceedings, as a rule, judges are lawmakers, judge and juror combined, our judiciary has very often considered itself as still far too sacred for criticism. Recently in Colorado, Ohio and New York, editors have been punished for contempt of court, which consisted of criticism published in their newspapers, and not in the presence of the court; and therefore having no direct tendency to disturb its orderly proceeding. In Colorado, perhaps in the other States also, proof of the truth was excluded. Judges, who under such circumstances punish their critics for contempt, simply because the criticism is not of such lady-like character as to be pleasing to the æsthetic judicial sense, are committing a most extraordinary outrage on the freedom of the press. With but very slight extension this constructive contempt of court will, in the very near future, develop into the régime of an infallible tribunal, disposing

of the property and liberty of citizens, and at the same time expunging the right of an adequate appeal to a public conscience for the reversal of iniquitous rules of injustice, by appropriate legislation, or election-day protest. Once establish such an infallible judiciary, and the precedent will soon warrant a re-establishment also of the infallibility of legislators, and executives.

Another most extraordinary clamor has come against the discussion of the negro problem in the North. In Philadelphia a play was suppressed, which was obnoxious to the negro population. In Brooklyn a similar clamor for its suppression was unsuccessful. In Chicago loud protests were heard against an address by Senator Tillman. However, there the authorities fortunately still deemed it more important to suppress disorder which might possibly result from discussion than to suppress freedom of speech itself. Last winter in New York City there was a public debate held in a church, as to whether or not Socialist propaganda should be suppressed by law. These are other straws showing the tendency of our time.

Already one per cent of the population of the United States hold 99 per cent of all its property. It is estimated, if the present rate of concentration of wealth shall continue, that within a century one hundred families will own 99 per cent of all the property. With the power on the part of the owners of such concentrated wealth to befuddle the mind of the public, through ownership of practically all popular periodical publications, and by their ability to purchase the election and the votes of those in power and to insure a "sane and safe" judiciary to explain away our constitutionally guaranteed liberties, the time may not be far distant when we shall have the legislative suppression of any adverse criticism upon political and economic theories, which are not advantageous to the rich few.

After the assassination of President McKinley

a newspaper reporter attempted to get an interview with a United States Senator, who had had some personal differences with the President. The Senator declined to be interviewed saying that because of his past personal differences he would have nothing to say. For exercising his freedom of speech by simply announcing that he had nothing to say, a large number of United States Senators, I think it was a majority, sent telegrams to a Southern paper, declaring their willingness to vote for his expulsion from the United States Senate. Here there was not even the excuse that the Senator's offending silence promoted crime, and it is a most glaring illustration of the instability of freedom, even with the most dignified, and, presumably, the most enlightened body of men that can be gathered in the United States. It is sad to contemplate how slender is the thread whose severance terminates our liberties.

Under the influence of that same unreason and epidemic of hysteria, ingeniously developed to the highest pitch of excitement by our conscienceless press, came into existence that multiplicity of state and national laws, directed against the mere abstract opinions entertained by people calling themselves Anarchists. All this came in spite of the fact that there was no evidence whatever that Czolgosz was an Anarchist. However, the word Anarchist was an effective epithet, and, hereafter all those to whom it could be even metaphorically applied must be denied their freedom of speech and of press, no matter how harmless or justifiable might be their political creed.

Under our present anti-anarchist laws, this government has established itself as an international police-force for the protection of all tyrants. Under our Federal statutes a foreigner who teaches "the propriety of unlawfully assaulting or killing any officer" in the "organized government" of a cannibal chief, or of a human butcher acting under auth-

ority of an arbitrary brute, crowned as a Tzar, though such immigrant is not an anarchist, and desires only to establish a more humane rule, such a foreigner is denied admission to the United States as unfit to touch our sacred soil, and is deported to take such punishment as may be meted out to him by those from whom he was fleeing.

Within a few days it was reported that Russian officials are demanding that a refugee, who escaped from Siberia, shall be deported from these United States because he is advocating the cause of, and raising money for, the Russian revolution. If the law is impartially enforced his deportation will follow.

Under the laws of New York State one may be guilty of advocating "criminal anarchism" without advocating anarchism or being an anarchist in fact. This of course is a fair sample of legislative intelligence. A Social Democrat from Germany, who in New York merely advocates the establishing of a German republic without the permission of Kaiser Billy, the war lord; or the Irish nationalist who in New York verbally asserts the propriety of overthrowing the organized government of England within Ireland's domain; the Russian or American patriot who would advocate the overthrow of the Tzar's absolutism, and his Cossack's official brutality, "by any unlawful means," though no lawful ones are provided; or whoever is voluntarily present at such discussion, is liable to five years' imprisonment and a fine of $5,000 besides. The owner, agent, superintendent or janitor of a building who permits it to be used for any of the above discussions is liable to a fine of $2,000 and two years' imprisonment. Furthermore, every editor and publisher of such articles as are above described, and innumerable such as have been published in our great dailies with impunity, is by this law presumed guilty of "criminal anarchy" until he proves himself innocent.

The metropolitan journals have nearly all violated this law, and no one protests. If relying upon these precedents, some unpopular victim of general prejudice, who is too poor to adequately defend his liberty, prints such matter, at once the luckless devil is pounced upon with a great flourish of righteous authority, and the use of unpopular and question-begging epithets, is sufficient to insure an unquesting public approval.

The unfortunate one goes to his prison cell, perhaps for advocating something most people believe in, or something the mob does not even understand, and then it thanks God that a "criminal Anarchist" has been made safe.

In all these cases, if we may take the justification for the abridgment of the liberty of speech to be made in good faith, the question involved is this: May a citizen advocate that which others esteem to be of immoral or criminal tendency? Since an affirmative answer to the latter implies an affirmative answer to the former, the problem in its broadest sense may be thus stated: Has any one the constitutional right to advocate the moral righteousness of conduct which the law has declared criminal?

But clarity of vision requires that we differentiate between two possible conditions. If such advocacy of crime has resulted in the commission of the crime advocated, then the promoter becomes liable as a principal, or as an accessory before the fact. In that case penalties are meted out to him for his participation in the subsequent crime, not for its mere fruitless advocacy.

That case must be carefully distinguished from the one in which the advocacy of crime is without any directly resultant criminal act. Here I am concerned only with the latter. The problem then is: Can a man, under our Constitution guaranteeing liberty of speech and press, be properly punished for his fruitless advocacy of crime? It seems to me that if we are to reason upon the matter only in general

terms, that then Professor Cooper in the following language has given us an unanswerable argument for an affirmative answer to our question.

"Indeed, no opinion or doctrine, of whatever nature it be, or whatever be its tendency, ought to be suppressed. For it is either manifestly true or it is manifestly false, or its truth or falsehood is dubious. Its tendency is manifestly good, or manifestly bad, or it is dubious and concealed. There are no other assignable conditions, no other functions of the problem.

"In the case of its being manifestly true and of good tendency there can be no dispute. Nor in the case of its being manifestly otherwise; for by the terms it can mislead nobody. If its truth or its tendency be dubious, it is clear that nothing can bring the good to light, or expose the evil, but full and free discussion. Until this takes place, a plausible fallacy may do harm; but discussion is sure to elicit the truth and fix public opinion on a proper basis; and nothing else can do it."

However, the importance of the problem deserves more specific consideration and discussion. Let us begin by assuming that one may be properly punished for even the fruitless advocacy of that which tends to crime, and see where such a conclusion leads us to. I have written several arguments against the inexpediency of suppressing "obscenity." The net results of those arguments in opposition to the suppression of obscene literature is that, on the whole, it is more beneficial to tolerate all obscenity in books than to allow, as we now do, the suppression of all thorough or searching discussion of sex problems. In other words, I am justifying, on the whole, the moral righteousness of so-called obscene literature. Necessarily, my argument for the legislative and judicial annulment of those laws might encourage some one to violate them.

If under our constitutions we are not protected in the right to advocate the moral righteousness of

that which the statute denounces as crime, it would seem to follow that in such a case as the one I have just stated, the Legislature may properly prohibit us from adequately arguing for the repeal or amendment of our present criminal code. This is an intolerable proposition. On the other hand, if the Legislature cannot prohibit such arguments, then it follows that the constitution does protect the citizens in advocating the moral righteousness or anything which the law denounces as criminal.

If the contrary doctrine could be established, it would only be necessary to make some line of conduct criminal, as a preliminary justification for prohibiting all discussion of the subject. And it must be apparent, if we admit that we have no right to advocate the moral propriety of conduct which the statute denounces as crime, that then we are admitting that there is practically no invasion of the liberty of speech which can not be legally accomplished. Already it is crime to smuggle dutiable goods into this country in violation of our tariff laws. To denounce a protective tariff as immoral and a robbery of the masses for the benefit of the protected monopolists is a legitimate argument for its abolition. However, such argument necessarily tends to encourage some toward the crime of evading the tariff. If then we have not the right to advocate the moral righteousness of that which the law denounces as a crime it would seem that Congress has the power to make a protective tariff the creed of a divinely established economic institution, which must be and thus can be maintained as a thing above criticism It follows, therefore, that no line can be drawn between the unlimited freedom of speech and press (holding the speaker and publisher responsible for the direct but actual consequences of their utterances), and that condition where we will have no freedom of speech and press as a matter of right, but only as a matter of legislative or judicial permission.

We may next inquire as to what must have been the intention of the framers of our constitution with reference to this problem. We can best gather that intention if we make inquiry as to the character of the abridgments of freedom of speech and press which had theretofore existed and against which they sought to protect themselves and others in the future. We recall that prior to the Revolution there was a union of church and state. Religious observances were enforced by the criminal law. Blasphemy, which was one of the number of excuses for invading the liberty of speech, consisted of language calculated to discredit the established religion, and tending to induce others to commit religious crimes, such as avoiding church attendance, and denying the correctness of what was there thought. In other words, our forefathers had been punished for advocating the verity and morality of that which was immoral and criminal under the existing law, and desired to make it impossible for others thereafter to be punished for the like advocacy of that which was of criminal tendency.

Another of the abridgments of the liberty of speech and press was the prohibition against seditious libel—of utterances which tended toward insurrection, rebellion and the general overthrow of the government. All of the participants in the American Revolution and all those who helped to bring it about, had no doubt been guilty of seditious speech and seditious libel; and apparently for the very purpose of protecting future generations in the right to advocate sedition and revolution, did they put in the Constitution a guarantee for the freedom of speech and of press, and omit the making of any exception.

If, then we take a broad outlook upon our problem, whether we view it from a standpoint of mere expediency or from the viewpoint of the framers of our Constitution, we must conclude that, under their

guarantees, it is the right of every man to advocate the moral righteousness of anything, even though such conduct has been denounced by the statute as a crime; and that every such advocacy was intended to be protected against punishment, excepting only the one condition, that a criminal act follows, as a direct and designed result of his utterances; and, in that event, he is to be punished for the subsequent crime and his intentional participation in it, and not merely for his utterances, as such.

If, in accord with the intention of their framers, our several constitutions guarantee freedom of speech and press to advocate sedition and revolution, holding individuals responsible only for an actual resultant invasion, then it must follow that Anarchists are clearly acting within their rights so long as they are content merely to talk to those who are willing to listen, and this no matter what may be the opinions which they express.

Some "radicals," who object to a censorship of sex literature, join with others to justify the censorship of Anarchist literature. They would limit freedom of speech at the advocacy of what *they* consider "invasive" crimes, sexual "crimes" not being regarded *by them* as invasive.

Herein they are more reactionary than the conservatives who framed our charters of liberty, and those of us who still rely upon constitutions, because these documents recognize no such exception to our guaranteed freedom of speech and press. Mr. Comstock only disagrees with these "radicals" on what constitutes an invasion. He would tell you that anything which "destroys all faith in God," or "discourages the sinners using common sense and being on the safe side," or impairs or is opposed to the present legalized monogamy, is a direct invasion and destruction of the integrity and very fabric of the social organism. Such "radicals" forget that the line of partition between invasion and defense is always the very matter in issue, and their assump-

tion that all persons are agreed with them upon what is an invasion is a mere begging of the whole question. Necessarily, then every person has an equal right to disagree with any other, and verbally to express that disagreement whether it is about economics, theology, the ethics of sex or of justifiable homicide.

The laws of every civilized country recognize some homicide as justifiable. Laws and opinions differ as to the conditions which make it so. That question is therefore, always a legitimate subject for debate.

I have read of a few theoretical non-resistants, but I doubt if any of these, who have a vigorous flow of good red blood in their arteries and who, under the tortures of the inquisition did avoid anesthesia, would not justify any practical use of violent resistance to such tyranny if exercised upon themselves.

Where is the beginning of tyranny, and where the limit of its silent endurance, and what the necessary degree of directness in fixing the responsibility for it, are all legitimate questions for debate, either in the abstract or concrete. Such discussions are conducive to a better understanding between rulers and the ruled. From the frankest of such criticism the rulers might be warned to re-examine the justice of their laws, as well as to inform themselves, or their partisan defenders, as to where is the need for correcting unjust criticism before a brooding over the matter, under compulsory silence, produces an unwarranted slaughter.

Like all natural phenomena, Anarchists of the violent type are not uncaused effects. If a man has been judicially declared sane enough to be electrocuted, for killing an official against whom he had no personal grievance, then surely the character and ethical sufficiency of his alleged humanitarian justification are a legitimate matter of unabridged inquiry and discussion.

I am not more infallible in my opinions about the ethics of justifiable tyrannicide than I am about those upon sexual psychology, or sexual ethics, or the thirty-nine articles of faith. If, then, I would maintain inviolate my right to express disagreement with others about religion, or another's right to express disagreement with Mr. Comstock about sexual ethics, I must also defend every man's right to express disagreement with me as to what constitutes justifiable homicide or tyrannicide.

For the reasons here outlined, I feel it my duty to protest against all laws which punish the mere expression of unpopular opinions, not having resulted in other acts prohibited by law. Every such abridgment of the freedom of speech or of press is a dangerous precedent from which will grow other like abridgments, until we enjoy any liberties only as a matter of permission and not as a matter of right.

Every such law is destructive of the fundamental equalities of human opportunity, and violative of the rights guaranteed by our constitutions. By these considerations I am impelled, at the risk of being misunderstood, or of deliberate misinterpretation, and of great unpopularity, to insist on both the legislative and judicial annulment of all anti-Anarchist laws, and every other law abridging even in the slightest degree the means of inter-communication between sane adult humans.

IV

# THE MEANING OF UNABRIDGED "FREEDOM OF SPEECH"

Revised from Vol. 68 Central Law Journal, p. 227-234.
*March 26, 1909.*

Among ignorant people, and some who have the reputation of not being so ignorant, there seems to have occurred a considerable doubt as to the meaning of our Constitutional guarantees of an unabridged "Freedom of Speech and of the Press." It is to dissipate a little this fog of doubt that this essay is written. Ignorant men are naturally timorous when they come in contact with things they do not understand, or the public expressions of ideas which, because of their unconventional trend, stimulate fearful emotions. When they seek to explain their absurd and unreasoned apprehensions, and the consequent desire to suppress the expression of an unpopular idea, they always fall back on the imaginary demands of an alleged public welfare.

The most barbarous edicts of the most outrageous tyrants usually speak to the abject wretches who are about to be sacrificed, a kind paternal word of assurance that their persecutors are only promoting the public welfare. This question-begging talk about public welfare requiring the suppression of any idea, no matter what, is misleading because such statements rarely, if ever, express the real motive for suppressing or punishing public discussion, and seldom is anything other than a symptom of stupid sentimentalism, or the mere pretext or sham excuse for the tyrannous violation of constitutionally guaranteed rights.

Those who are willing slaves, through arrested intellectual development, and those who are tyrants, through the excessive lust for power, sometimes coupled with feverish paroxysms produced by hysterical fear, never see any merit in the claim of human liberty as a matter of natural or constitutional right; and so from very different causes these two large classes are always unable to discriminate between a real assault upon the real public welfare and a materially harmless, mere intellectual attack upon their established interests, vanity or superstition.

If the Constitution had said that "legislative bodies shall make no law abridging man's freedom to breathe," no one would have any doubt as to what was meant, and every one would instantly say that of course it precluded government from passing any law which would prohibit breathing according to the mandate of a policeman, before trial and conviction, and that it would equally preclude the passage or enforcement of any law which would punish breathing, merely as such, upon conviction after the fact. No sane man could be found who would say that such a guarantee, to breathe without any statutory abridgment, only precluded the appointment of Commissioners who should determine arbitrarily what persons might be licensed to breathe and who should not be so licensed, and that it would still permit government to penalize all those who do not breathe in the specially prescribed manner, even though such criminal breathing had not injured anyone.

There is not the slightest reason to be given why "freedom" in relation to speech and press should be differently interpreted. The only explanation for having interpreted it differently is that people generally, and petty officials in particular, believe in unabridged freedom to breathe, but emotionally disbelieve in unabridged freedom of speech, and therefore, they lawlessly read into the Consitutions meanings and exceptions which are not represented there

by a single syllable or word, simply because they think, or rather feel, that the Constitution ought not to guarantee freedom of speech and of the press, for those ideas which intensely displease them.

The ordinary and plain meaning of the word "freedom" should readily have solved all problems, if there ever really were any such, which were discoverable by reason, uninfluenced by hysterical emotions and fears. In common parlance, we all understand that a man is legally free to perform an act whenever he may do so with impunity, so far as the law is concerned. Thus no one would claim that another was legally free to commit larceny so long as larceny involved liability of subsequent criminal punishment. No one would say that the law leaves a man free to commit murder so long as we may legally resist the assailant by killing him in self-defense, and there is a law punishing murder. Likewise no man, who is depending purely upon the words of the Constitution, will ever say that we have unabridged freedom of speech and press so long as there is any law which prescribes a penalty for the utterance of anyone's sentiments, merely as such utterance and independent of any actually accomplished injury to another.

## THE ABUSE OF FREEDOM

On the other hand, it would seem equally certain, to the ordinary understanding, that there exists no legal abridgment of a man's freedom to speak or write, if he were punishable for the abuse of that freedom, provided we only mean by "abuse" an actual and not a mere constructive abuse; that is, provided he is punished only for an actual, and not a constructive injury, resulting from his utterance. Manifestly in such a case he is not punished for the speech as such, but he is punished for an actual, ascertained, resultant injury, to some one not an undeceived voluntary adult participant in the act.

His utterance in that case may be evidence of his complicity in, or contribution to that actual injury,

and punishment for an actual resultant injury is not in the least an abridgment of the right to speak with impunity, since manifestly it is not a punishment for mere speaking as such, the essence of criminality—the criteria of guilt—being something other than the utterance of his sentiments. Manifestly in this view, which is but the natural import of the words "freedom of speech and of press," the expression can only mean that every man under the law shall have the equal right and opportunity of every other man to utter any sentiment that he may please to utter, and do so with impunity, so long as the mere utterance of his sentiments is the only factor in the case. It does not exempt him from punishment as an accessory to murder, arson or other actual and resultant injury, but leaves it where he may be punished for his contribution toward and participation in bringing about these injuries, but not until they have become realities. His utterances may be evidence tending to show his responsibility for the actual injury which is penalized, but the penalty attaches on account of that injury, and can never constitutionally be predicated merely upon the sentiments uttered, without, to that extent, abridging our freedom to utter. When the statute or the police officer does this the constitutional right is violated, notwithstanding the courts sometimes hold otherwise. The chief abuse of free speech consists in punishing one for an utterance which actually did no material harm to anyone, no matter how outrageous it may seem to moral sentimentalists.

## AS TO PREVIOUS RESTRAINT.

Both the words "speech" and "press," as used in our constitutions, are limitations upon the word "freedom" as therein used. The purpose of this clause is to preclude the legislative abridgment, not of all liberty, but of liberty only in relation to two subjects, to wit: "speech" and "press." It is manifest therefore that the same word "freedom" cannot

change its meaning according to whether the utterance is oral or printed. In other words "freedom" must mean the same thing whether it relates to "speech" or "press." Our American courts have repeatedly held that "freedom of the press" means the absence of all restraint previous to publication.

Freedom of speech, by parity of reason, therefore means, at least, the freedom to speak freely without any restraint previous to utterance. Furthermore, there never was a time when a censor assumed to pass upon oral speech, prior to its utterance. Unpopular oral speeches were only punished after utterance. The whole controversy over "freedom of speech" was a demand that speakers might be free from such subsequent punishment as well as previous restraint, for those of their utterances which in fact had not actually injured anyone, and it was that controversy which the framers of our constitutions intended to decide for all time, by guaranteeing to all the equal right and opportunity, so far as the law is concerned, to speak one's sentiments upon any subject whatever, including even treason and assassination, and with absolute impunity so long as no one was actually injured thereby, except by his voluntary and undeceived consent, as when the person is convinced to the changing of his opinion about some abstract doctrine of morals or theology, the acceptance of which his neighbors might deem a deterioration, and the new convert esteems it a moral and intellectual advance. If as I believe this is the inevitable interpretation of "freedom" in relation to "speech" and the meaning of "freedom" in relation to "press" must be the same, then we are irresistibly forced to the conclusion that many have been wrong in asserting that "freedom" in relation to the press means only the absence of a censorship prior to publication without enlarging those intellectual liberties which are beyond the reach of legislative abridgment. This then precludes punishment subsequent to utterance, unless actual injury has resulted.

When we come to make an historical study of the meaning of "freedom of the press" we will at once discover that the personal elements disappear, to be replaced by humanistic considerations. Now it is not merely a question of previous restraint, of imprisonment or fines, but a question of intellectual opportunity;—not only a question of the opportunity to speak, but of the more important opportunity of the whole public to hear and to read whatever they may choose, when all are free to offer. Now it ceases to be a matter of the personal liberty of the speaker or writer, and must be viewed as a matter of racial intellectual development, by keeping open all the avenues for the greatest possible interchange of ideas, without discrimination even against those of supposed evil tendency. In this aspect the most important feature of the whole controversy simmers down to this proposition, namely: that every idea, no matter how unpopular, so far as the law is concerned, shall have the same opportunity as every other idea, no matter how popular, to secure the public favor. Of course only those ideas which were unpopular with the ruling classes were ever suppressed. The essence of the demand for free speech was that this discrimination should cease. In other words, every inequality of intellectual opportunity, due to legislative enactment or arbitrary police interference, was and is an unwarranted abridgment of our natural and constitutional liberty, when not required by the necessity for the preservation of another's equal right to be protected against actual material injury.

Among the reasons underlying this interpretation of our Constitution, and the very instrument itself, the following is most concisely and most convincingly stated by Prof. Cooper in these words:

"Indeed, no opinion or doctrine, of whatever nature it be, or whatever be its tendency, ought to be suppressed. For it is either manifestly true or it is manifestly false, or its truth or falsehood is dubious.

Its tendency is manifestly good, or manifestly bad, or it is dubious and concealed. There are no other assignable conditions, no other functions of the problem.

"In the case of its being manifestly true and of good tendency there can be no dispute. Nor in the case of its being manifestly otherwise; for by the terms it can mislead nobody. If its truth or its tendency be dubious, it is clear that nothing can bring the good to light, or expose the evil, but full and free discussion. Until this takes place, a plausible fallacy may do harm; but discussion is sure to elicit the truth and fix public opinion on a proper basis; and nothing else can do it."—Cooper's "A Treatise on the Law of Libel and the Liberty of the Press," p. xxi.

This last quoted argument never has been answered and never will be. Unfortunately, uncultivated minds are usually so constituted that they may readily endorse such a general idea as that presented by Prof. Cooper, and yet shrink from an endorsement of a particular instance which comes clearly within the principle. As for myself I can see no flaw in the quoted statement of Prof. Cooper and I am entirely willing to apply it to every conceivable particular. Accordingly, I am led to affirm my concurrence in the following words from the pen of a former member of the English Parliament, the Hon. Auberon Herbert. He wrote:

"Of all the miserable, unprofitable, inglorious wars in the world [the worst] is the war against words. Let men say just what they like. Let them propose to cut every throat and burn every house—if so they like it. We have nothing to do with a man's words or a man's thoughts, except to put against them better words and better thoughts, and so to win in the great moral and intellectual duel that is always going on, and on which all progress depends."—Westminster Gazette, Nov. 22, 1893.

The sentiments just quoted I believe to be expres-

sive of the true meaning of our constitutional guarantees for an unabridged freedom of speech and of the press:—

I. Because in accord with the logical requirements of natural law;

II. Because in accord with the exact signification of the constitutional language;

III. Because supported by the historical interpretation of our Constitutions, which I have not been able to discuss in this brief essay. (This is discussed at length in "Obscene Literature and Constitutional Law."

V

# ERSKINE ON THE LIMITS OF TOLERATION

AMONG English speaking people, Thomas Erskine is almost the only man who has rendered either conspicuous or effective service, in the forensic defense of a larger freedom of speech. Some of his utterances upon this subject are judicially quoted as authority upon the meaning of our constitutional guarantees for unabridged liberty of utterance. This raises the question how far may we properly quote Erskine as such an authority? What were his real convictions about the limits of toleration? Should it be considered hazardous to quote, as authority, isolated passages from Erskine's speeches, for the purpose of justifying the limitation of toleration, even though we could be positive that he was always untrammelled in the absolutely frank expression of his opinion upon this subject?

It is regrettable that Erskine left no academic discussion freely and fully setting forth in unequivocal terms just what was his opinion about a legally limited toleration. At least to lawyers, it must be manifest that in the defense of an accused, under conditions then existing for Erskine, the exigencies of professional duty usually would preclude any lawyer from defending a belief in *unabridged* freedom of speech, even though he actually believed in it. Under the English system it would have been absurd to have based a defense upon the broad proposition that the unwritten constitution prohibited *all* laws anywise abridging freedom of utterance. In his contentions, as to what was the existing law under which he was serving a defendant, it became Erskine's plain duty to claim, or defend, no broader

principles of liberty than were necessary for the acquittal of each particular client. In and for the purposes of every case defended by him, his manifest obligation and interest was to assume for his client the least possible burden, and this obligation tended to induce the maximum of concessions, to the prosecution, consistent with the acquittal of his client. His duty to his client was to secure the most favorable interpretation of the existing laws then abridging freedom of speech and not to indulge in academic discussions for their ultimate total abolition. These considerations impose the inference that even if Erskine had believed in *unabridged* freedom of utterance, its defense could hardly have been the essence of his forensic discussions, and, if in these it found expression at all, it would be only in an inadvertent or incidental way.

This brings me back to the question: Did Erskine really believe in *unabridged* liberty for the utterance of one's opinions? If not, his opinions cannot be properly used as an aid to the interpretation of our constitutional guarantees. If he did believe in *unabridged* freedom of speech, then, it seems to me, our courts have perverted his sentiments in order to make them an authority for the curtailment of our liberty, in spite of our constitutions. May it not be that our courts have ignored Erskine's real opinions, to explain away our constitutional guarantees by quoting, from him, isolated passages, dictated by expediency, or expressing only the facts of practice, under a system of limited liberty by permission, and so actually misrepresenting the real Erskine, by mistaking such utterances as general standards by which to define and determine the existence of *unabridged* freedom of speech.

It does seem to me that in this matter, if we content ourselves with such superficialty as our courts have used, it would be very easy to prove that Erskine did not at all believe in *unabridged* freedom of speech, and therefore is not in the least an author-

ity on the construction of the free-speech clauses of our constitutions. Did not Erskine successfully prosecute Paine's *Age of Reason* which no public prosecutor, or court, in America has ever asserted to be beyond the protection of our constitutional guarantees of free speech? Commenting upon the apparent conflict between his speech prosecuting Paine's "Age of Reason" and that other speech of his in defense of Paine's "Right of Man," the editor evidently wishing to establish for Erskine a reputation for general conservatism, said of his defenses of liberty, that these "we can only consider as the argument of an advocate bound to give the best assistance to a client," but that speech of Erskine's demanding the abridgment of freedom of the press, the editor assures us, "may be considered as containing his [Erskine's] own opinions and principles."[1]

When we thus find Erskine cited as an authority both for and against *unabridged* freedom of speech, we are forced to conclude that his real opinions on the limits of toleration must be found, if found at all, in those little incidental indiscretions of his arguments which are deemed indiscretions because unnecessary to the immediate purposes of his client's defense, and in the nature of a claim against his interests, because a claim of either too much or too little, for his client's good. At times such indiscretions are quite unavoidable by persons very much in earnest, and they arise out of the psychologic difficulty of adhering to the limitations of a special plea, when such limitations conflict with, or do not include all that is essential to a correct portrayal of the pleader's convictions. Did Erskine portray his real convictions by any such inadvertencies?

To my mind, one of the essential tests of unabridged freedom of speech is this, that no man shall be punished criminally for any utterance of his, upon any subject, no matter how offensive, or how dangerous may be its tendency, when that tendency is only

[1] Erskine's Speeches, Vol. 2, p. 183-184, edition of 1810.

speculatively, prospectively and imaginatively ascertained. This admits the right to indulge, with impunity, even in the fruitless advocacy of "treason" and of course the lesser crimes, and demands that men should not be punished for a mere psychologic offense, unconnected with criminal intent and with overt acts of invasion, or with any actually ascertained and resultant material injury.[2]

How then did Erskine stand with reference to unabridged freedom of speech, according to this test, which requires that speech, *merely as such,* shall always be free, and that actual and material resultant injury, or an act with the imminent danger thereof, according to the known laws of the physical universe, shall be always one of the conditions precedent to the punishment of a mere speaker? Intent should be another.

The following extracts from Erskine's published speeches are the answers to my question. These are the spontaneous inadvertencies which I believe portray his real convictions upon this issue now under consideration. The italics used are mine.[3]

"I maintain that opinion is free, and that conduct alone is amenable to law.

"The principle is this that every man, while he obeys the laws [prohibiting invasive acts], is to think for himself, *and to communicate what he thinks.* The very ends of society exact this *license,* and the policy of the law, in its provisions for its security, has tacitly sanctioned it. The real fact is, that writing against a free and well proportioned government, need not be guarded against by laws. They cannot often exist and never with effect."[4]

[2] For a more complete statement and justification of this view see Central Law Journal, Mch. 26, 1909, and Mch. 7 to 28, 1910; MOTHER EARTH, June 1907-May 1910. These are incorporated in "Obscene Literature and Constitutional Law."

[3] Erskine's Speeches, Vol. 2, p. 104, Paine Case.

[4] Erskine's Speeches, Vol. 2, p. 133, Paine Case.

"I am not contending for uncontrolled conduct, but for freedom of opinion."[5]

"Chief Justice Wright (no friend to the liberty of the subject) * * * * interrupted him [The Attorney General] and said, 'Yes, Mr. Attorney, I will tell you what they offer, which it will lie upon you to answer; they would have to show the jury how this petition HAS disturbed the government, or diminished the King's authority.' So say I. I will have Mr. Bearcroft [the attorney, then prosecuting] show you gentlemen [of the jury] how this Dialogue [of the Dean of Asaph which was the basis of the charge] HAS *disturbed* the King's government, excited disloyalty and disaffection to his person,—*and stirred up disorder* within these kingdoms."[6]

"It is easy to distinguish where the public duty calls for the violation of the private one; criminal intention but not indecent levities, not even grave *opinions unconnected with conduct are to be exposed to the Magistrate.*"[7]

"Constructed by man to regulate human infirmities, and not by God to guard the purity of angels, it [the venerable law of England] leaves to *us our thoughts, our opinions and our conversations and* PUNISHES ONLY OVERT ACTS, of contempt and disobedience to her authority. Gentlemen, this is not the specious phrase of an advocate for his client, it is not even my exposition of the spirit of our constitution; but it is the phrase and letter of the law itself."[8]

"What is it that has lately united all hearts and voices in lamentation? What but these judicial executions, which we have a right to style murders, when we see the axe falling, and the prison closing upon the genuine expressions of the inoffensive heart; sometimes for private letters to friends, *unconnected with conduct or intention;* sometimes for momentary

[5] Erskine's Speeches, Vol. 2, p. 159, Paine Case.
[6] Erskine's Speeches, Vol. 1, p. 205, St. Asaph's Case.
[7] Erskine's Speeches, Vol. 2, p. 343, Frost Case.
[8] Erskine's Speeches, Vol. 2, p. 346, Frost Case.

exclamations in favor of royalty or some other denomination of government different from that which is established."[9]

These statements of general principle, made by Erskine, and usually quite outside the necessary issues of the cases in which they were uttered, I believe give us warrant for asserting that he believed in *unabridged* freedom of speech as a natural right, and that by unabridged freedom of speech he meant substantially the same thing as that for which I have contended.

That Erskine believed in the fundamental right of everyone to advocate even treason is further shown by his reasoning. He said: "When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface;—but pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe."[11]

However, it must be admitted that, nothwithstanding his repeated clear enunciation of the general principle that no guilt can be predicated except upon overt act and criminal intent, it was not always consistently reaffirmed by him in all particular cases. The prosecution of Paine's "Age of Reason" is an example. The exigencies of professional obligation adequately explain this seeming inconsistency, and it is possible that his religious and emotional nature also had something to do with the seeming inability to make conclusive deductions from his general principles to every specific case that came within them.

And yet even in this case of Williams there is some evidence to show that Erskine was not deeply interested in the suppression of blasphemy.

[9] Erskine's Speeches, Vol. 2, p. 353, Frost Case.

[11] Speeches of the Hon. Thomas Erskine, Vol. 2, p. 141, 1810.

After securing the conviction of Williams and before sentence was passed Erskine learnd of the poverty and illness of the convict and refused to proceed to judgment. When the Society for the Prevention of Vice declined to join him in praying the court to mitigate the punishment he refused to accept his fee and withdrew from the case, "because they loved judgment rather than mercy."[10]

The English governmental machinery certainly left Erskine quite helpless, in his efforts to secure the adoption of these general principles into the juridicial system. Only two methods were open. The one was to secure a written constitution, such as was once supposed obtained in America, inhibiting all legislative abridgment of freedom of speech; and the second was to secure a universal acceptance of his general principle and its application to every conceivable case, such as is essential to make a constitutional prohibition effective, and which principle might occasionally be made effective without a written constitution, if juries could be permitted to rejudge the law for themselves.

Erskine lived long enough to see, in America, the passage of the Alien and Sedition law, in spite of the restraint of our American constitution, and this showed him how useless are paper constitutions, if the people do not possess an enlightened view of the pernicious power which such constitutions are intended to destroy. Perhaps he even foresaw this in 1793 when he made his famous statement before the "Friends of Liberty of the Press," wherein he, seemingly at least, abandoned his oft repeated demand for absolute certainty in the criteria of guilt.[12] In

[10] Penalties upon Opinion, 94; citing Autobiography of Mrs Fletcher, ed. 1875, p. 137.

[12] For this demand see, in the edition of 1810, as follows: Vol. 1, pp. 72-73-77-78-129-182-186-331-333-334-337; pp. 143-162-190-268; Vol. 3, pp. 338-356-439-497; Vol. 4, pp. 436-437. For my own literature on this subject see "Due Process of Law in Relation to Statutory Uncertainty and Constructive Offenses," and Cent. Law Journ., Dec. 18, 1909. All these and

this carefully prepared statement he said this: "The extent of the genuine Liberty of the press on general subjects, and the boundaries which separate them from licentiousness, the English law has wisely not attempted to define; they are indeed in their nature undefinable; and it is the office of the jury alone to ascertain them."[18] This statement was made in support of his contention that juries should be authorized to decide the law as well as the facts. In America our Constitutions have attempted to define the boundaries of genuine liberty of the press by saying that it shall remain unabridged.

I said Erskine *seemingly* abandoned this demand, but it was only *seemingly,* for in this same paper he again denounces the uncertainty of the laws for seditious libel, and the infamous system of spy-societies which then, as now, inflict their unctuous piousity on a dull, and consequently patient, public. So then I conclude that Thomas Erskine was a true believer in a real unabridged liberty of utterance, where no man could be punished so long as the mere verbal portrayal of his ideas is the only factor involved.

In England, about a century ago Thomas Erskine, with such a record, was made Lord High Chancellor. In America, at the present time, such statements would put him only in the class "undesirable citizen" to be specially criticised, and denounced as an anarchist especially by many of those claiming to be "liberals" or "radicals," of the "respectable" type. Thus we have another illustration that English royalty a century ago was less afraid of real liberty than the American mass of to-day; and herein we also see how the very essence of tyranny thrives under the forms of democracy. With us every stupid policeman, fanatical judge, or moralist for revenue, can successfully abridge freedom of speech by the lawless use of power, and the hysterical mob of pretend-

other articles of mine appear in "Obscene Literature and Constitutional Law."

[18] Erskine's Speeches, Vol. 4, p. 489.

ing lovers of liberty and democracy will stand by and applaud,—so low have we fallen since our American Constitutions were written.

# On Seditious Opinions

*By*

REV. ROBERT HALL

THE law hath amply provided against *overt acts of sedition and disorder*, and to suppress mere opinions by any other method than reasoning and argument is the height of tyranny. Freedom of thought being intimately connected with the happiness and dignity of man in every stage of his being, is of so much more importance than the preservation of any Constitution, that to infringe the former under pretense of supporting the latter, is to sacrifice the means to the end.

## VI

# LIBERAL OPPONENTS AND CONSERVATIVE FRIENDS OF UNABRIDGED FREE SPEECH

Condensed from a Lecture Delivered before the Brooklyn Philosophical Association, March 13, 1910.

IN the present contest for the unabridged freedom of speech guaranteed by our Constitutions, the sources of irritation and agitation are three. The first is Socialist groups, among which the most acute recent crisis came in Spokane, Washington. The issue there was one of time, place, and manner, rather than a question of the subject matter of the offending speeches. No doubt, the real secret motive behind the police activity was a vague hatred and fear of Socialism, but no definite issue was made over the right to advocate any specific doctrine. The only issue tendered by the authorities was as to the right to use the streets for purposes of agitation, and the right to conspire to violate alleged ordinances regulative of street oratory. These issues are of practical importance, as a means to an end for those wishing to use this method of propagating their tenets, but seldom offer definite controversy over *free speech principles,* such as are capable of academic discussion.

The second source of free speech agitation has come chiefly through my own effort in defense of freedom of sex-discussion, which naturally led me to a consideration of the right to advocate other doctrines of disapproved, and even criminal, tendencies. Here definite statements of principles are asserted

and denied. On these issues some of our liberal friends have taken sides, and their contentions will be somewhat discussed. My consideration of the right to advocate crime connects me in a subordinate way with another center of free speech interests.

The third focus of irritation in relation to free speech is Emma Goldman, in her effort to secure a hearing for Anarchism. The reason assigned for suppressing Emma Goldman's speech is the fear that evil consequences will come as the result of her utterances. It is believed that these evils arise directly from her intellectual attack upon religion, the legally maintained family, and from her attacks upon our economic structure and coercive government.

It is claimed that because of these elements, or of some of them, her speeches have a *tendency* to lawlessness and riot. It is seldom claimed, and never truthfully claimed, that any riots have followed her speeches. Once she was convicted and punished on the pretense of inciting to riot, though no riot occurred. The official justification for suppressing Emma Goldman is in effect the assertion of a rightful power officially to suppress in advance of utterance, and punish after the fact, all discussions which are suspected or believed, even remotely and indirectly, to produce evil results. (However, I am glad to see that the hysteria over Miss Goldman and Anarchism is subsiding a little.)

The issues and arguments thus presented by the suppression of Miss Goldman, and of sex-discussion, should be fairly and frankly answered, or supported by our liberal friends. It seems to me that this has not been done, and I am going to call attention to this record for the purpose of exhibiting what seem to me to be the evasions and mistakes my liberal friends have made, in the hope that some may be dissuaded from the repetition of their folly, which may have been induced by an excessive zeal for retaining a speaking acquaintance with respectability.

One of the first essays I wrote in defense of free-

dom for sex-discussion was a paper presented to the XV International Medical Congress held in Lisbon, Portugal.[1] There I argued that the only thing common to all "obscenity," is a subjective emotional condition. In other words, I tried to make a scientific demonstration that unto the pure all things are pure. Later, I wrote of obscenity and witchcraft as twin superstitions, asserting that both would cease to be when people ceased to believe in them. Now let us see how our liberal friends met the argument made in support of that contention.

OUR LIBERAL EDITORS.

*The Truth Seeker,* probably the best of our Agnostic papers, editorially expressed its unconscious desire to help Mr. Comstock. The late editor wrote: "We have little confidence in this argument and would enjoy seeing it demolished."[2] I promptly sent the editor another copy of the essay and a letter requesting that he demolish the argument, by pointing out errors of fact or logic. Profound silence was the only answer. However, other liberal friends were not disposed of so easily.

The editor of *Secular Thought,* the best free thought paper published in Canada, wrote: "In our humble opinion, such an argument is childish in the extreme,"[3] but he did not even attempt to answer it.

Dr. Robinson, who edits several magazines and claims to be a "sane radical," without criticising my argument assured his readers that "This argument is exceedingly childish."[4] He also thought a popular dogmatism was a sufficient answer.

Mr. Comstock showed himself to be in entire harmony with these dogmatizing liberals. He comments in these words: "It is all right, from the mere standpoint of debate and discussion, to theorize and say that there is no such thing as an obscene book or

[1] See Proceedings, also *Albany Law Journal,* July, 1906.
[2] *Truth Seeker,* June 29, 1907.
[3] *Secular Thought,* August, 1907, p. 312.
[4] *Altruria,* June, 1907, p. 1.

picture. The man who says it simply proclaims himself either an ignoramus, or is so ethereal that there is no suitable place on earth for him."[5] In a letter to me he explained that he was too busy to point out defects in my argument.

HAVELOCK ELLIS' STUDIES IN PSYCHOLOGY OF SEX.

Since these liberals thought it unadvisable to answer my argument, and were satisfied merely to express their emotional disapproval of my conclusions, I may content myself with an approving quotation, from one who does not advertise his radicalism, but is a mere scientist and happens to be the world's most famous sexual psychologist. The following words are from his last (sixth) volume of "Studies in the Psychology of Sex": 'Anything which sexually excites a prurient mind is, it is true, 'obscene' *for that mind,* for, as Mr. Theodore Schroeder remarks, obscenity is 'the contribution of the reading mind.' "[6] I think with this endorsement of my conclusion, and my unanswered argument, I can let this issue rest.

Dr. Robinson made argumentative comment which is in the nature of a confession and avoidance. He wrote: "And so [as in the case of beauty and ugliness] it is in regard to obscenity. The thing in itself is not obscene; in the midst of the desert, or at the bottom of the sea, it is not obscene. But if it induces some people, however small a number, to commit indecent, unhealthy things, then that thing *is* indecent, and no amount of sophistry can do away with the fact."[7] He of course fails to see that he is only restating the argument formerly made in support of witchcraft. How absurd for a man with some of the credentials of a scientist, to argue that something which is not obscene in itself can be made so by vote. Had he read my argument intelligently he would have seen that by his last test even "Uncle Tom's

[5] *The Light,* January, 1907, p. 61.
[6] Studies in the Psychology of Sex, Vol. 6, p. 54.
[7] *Altruria,* ——— 1907, p. 2.

Cabin" comes under his condemnation as an obscene book.

There is another type of comment upon my argument, also in the nature of a confession and avoidance because it does not attack the argument itself, but which deserves more explicit criticism than it has hitherto received. The matter is well presented by the editor of *Secular Thought,* who no doubt believed he had delivered a stunning blow when he wrote this: "Would Mr. Schroeder take a virtuous and modest lady friend to a Seeley dinner? If not, why not? The lady would not see anything obscene, because nothing objectively obscene exists, and consequently she would not blush or be shocked in the least. Would he take home a brutal, coarse-mouthed jade from the Bowery and expect his wife to be entertained by her filthy jests? Would he show a number of so-called 'obscene' transparent picture-cards to his daughters and expect them to be edified thereby? Have Free Speech extremists made an alliance with Christian Scientists?"[8]

If a woman is afflicted with the modesty of prurient prudery, then I would not take her either to a Seeley dinner or to the Metropolitan Museum of Art. If she was modest only in the sense of having a clean, healthy mind and body, I might take her to either place. Such a woman as I have postulated has viewed her own body without shame, or injury to herself, and would not be any more injured by other sights of mere nudity in art or nature. The experience of art students in life studies is a proof. If I refused to take a woman to a Seeley dinner, it would not be because there was any obscenity in the mere nudity of the dancer, but on account of the probable obscenity in the mind of other spectators, and who, by reason thereof, might make themselves disagreeable. It is these disagreeable experiences which come from associating with the coarse-mouthed jade of the Bowery, or the spiritualized sensualism of the

[8] *Secular Thought,* Aug., 1907, p. 312.

lewd purists, or the impudence of the avowed voluptuary, which alone makes truly decent people avoid nudity, when such are around. It is not the obscenity in the nudity, but that obscenity which is in the minds of some excessively lewd co-spectators, which I would seek to avoid, for myself and for my women friends. It is evident, therefore, that the questions propounded by the editor of *Secular Thought* do not in the least degree impair or answer my argument.[9]

VARIOUS CONCEPTIONS OF FREEDOM.

From the comment presently to be quoted it appears that these editors, like Mr. Comstock, believe in a limited liberty by permission and do not see that my only object is to secure an unabridged and an unabridgable freedom of utterance as a matter of constitutionally guaranteed, natural right. I am opposed to all mere psychologic crimes; they are not. Failing to see this difference, they scold me for injuring this cause of freedom because I am asking for a liberty which they are willing to destroy. One of these editors thus condemned my effort to secure unabridged freedom of utterance: "We certainly look for and work for more liberal laws than those under which we live at present, but we imagine they can only be enacted through an enlightened public sentiment, and we think their advent will be retarded rather than assisted by such ultra-rationalism as that of Mr. Schroeder."[10]

Dr. Robinson scolded me for seeking the *unabridged* right to hear and read, which by the constitution is guaranteed to me and every other adult. This is what he said: "I wish to add that you would do the cause of free press a much greater service if you admitted openly that you do draw the line at nasty 'literature' and filthy 'art,' the purpose of which is exclusively to pander to the vices of imma-

[9] See Psychologic Study of Modesty in *Medical Council*, January, 1909.

[10]) *Secular Thought*, Aug., 1907, p. 811.

ture youths and degenerate *roués.* If you claim that we must not draw the line anywhere, you destroy your usefulness, and rational, normal people cease to consider you seriously."[11]

So strenuous is he in his insistence that I should be content with a limited intellectual liberty as a matter of permission only, that he even thought it necessary to falsify my contention. In an article on "What we would have to maintain to find favor with certain 'Radicals,'" he wrote a paragraph manifestly intended for me. It reads thus: "That there is no such thing as obscenity, and that all the pornographic filth sold secretly to young boys and old *roués* is *pure and noble literature,* and is declared filthy only by mentally strabismic and over-sensitive purists."[12]

The editor of *The Humanitarian Review,* in order to justify himself in the matter of abridging my freedom to read what I please, was unconsciously driven to adopt the Anarchist position that the cooperation of which the State is the embodiment, has its moral justification only in the consent of the entire community. He wrote: "There is not, never was, and never can be such a thing as *absolute* liberty or freedom (of speech or other kind of human conduct) of men in association. * * * * * Society has the right, by *his own agreement with it, to restrain him from doing (or saying, if you will)* things harmful to society or any of its individual members."[13] If I denied ever having made such an agreement, I suppose this "rationalist" would tell me I was simply ignorant of what I had done in a former incarnation.

Thus this "liberal" editor justifies every persecution which has ever blighted the human intellect, for all persecutors have claimed that the persecuted one uttered something "harmful to society." If by that

[11] *Altruria,* June, 1907, p. 3.
[12] *Altruria,* March, 1908. (Italics are mine. T. S.)
[13] *Humanitarian Review,* September, 1908, p. 108.

phrase he had meant an actually realized material injury, he would have agreed with me. But he is evidently willing to punish imaginary and constructive injuries.

### SIR OLIVER LODGE ON OBSCENITY.

Now let me contrast the foregoing views with those of mere conservative scientists and thinkers who believe in more intellectual liberty than these radicals whom I have quoted. Sir Oliver Lodge recently said: "And lower than these [trashy, cheap novels] there lurks in holes and corners pernicious trash written apparently with the object of corrupting youth—if that horrible and barely human suggestion can be tolerated; but this is not literature, nor does it pretend to be, or if it does, it can only do so by obvious cant. *The way to root out this abomination is to cultivate the soil round the growing organism, to strengthen the phagocytes of its own system, to make it immune to the attacks of vermin.*"[14]

I will quote another who had similar views, and yet was so conservative and respectable that even Mr. Comstock says he ought to have known better:

"The tares of error must be left to grow in the same field with the wheat of truth, 'until the harvest'—that is, until they bear their natural fruits and their true character reveals itself *in actual deeds*—when they may be rooted up, in the persons of those who illustrate them, and cast into the fiery furnace of the law!"[15]

### THE NUPTIAL OF FILTH AND AGNOSTICISM.

I am now going to quote a few paragraphs from authors who imagined themselves to be great antagonists, and I am sure that few could guess their names, merely from reading the following extracts, or, knowing their names, few could guess which part belongs to each.

[14] *Fortnightly Review*, Feb. 1910, p. 264. Italics are mine.
[15] Oliver Johnson, *Orange Jour.* N.J., Aug. 24, 1878, requoted from "Frauds Exposed."

"Suppose some man has been indicted, and suppose he is guilty. Suppose he has endeavored to soil the human mind. Suppose he has been willing to make money by pandering to the lowest passions in the human breast. What will that [defense] committee do with him then? We will say, 'Go on; let the law takes its course. * * * * * There is not a man here but is in favor, when these books and pictures come into the control of the United States, of burning them up when they are manifestly obscene. You don't want any grand jury there. * * * * * It is easy to talk right—so easy to be right, that I never care to have the luxury of being wrong." * * *

"I believe in liberty as much as any man who breathes. * * * * Every man should be allowed to write, publish, and send through the mails his thoughts upon any subject, expressed in a decent and becoming manner."[16]

"I accord to every man the fullest scope for his views and convictions. He may shout them from the housetop, or print them over the face of every fence and building for all I care."

"There never had been a man arrested under these laws, except for sending obscene and immoral articles or advertisements through the mails; there was but one reason why these laws should be repealed, and that was, because it interfered with their infamous traffic, and prevented these scoundrels from using the mails of the United States for their base purposes."[17]

"I am not in favor of the repeal of those laws. I never have been, and I never expected to be."[18]

"It is a question, not of principle, but of means."[19]

Thus Ingersoll and Comstock are quite in harmony that something ought to be suppressed by arbitrary and lawless power, without accusation or

[16] Ingersoll, As He Is, pp. 116-124-128-129-131.

[17] "Frauds Exposed," by Anthony Comstock, pp. 408-420-421.

[18] Ingersoll, As He Is, p. 129.

[19] Ingersoll, As He Is, p. 132.

trial. However, they were not agreed as to all that should be included within the arbitrary power. Ingersoll as a lawyer saw that frequently evil results came from the fact that obscenity could not be defined. He sought to remedy this by having the statute so amended as to make intent the essence of the offence. When the motive of the accused was to benefit society, no matter how mistaken he might be, Ingersoll would acquit. This much is to be credited to his generous impulses. He did not see that courts would have wiped out such a statute by saying that the accused must be presumed to have intended the evil consequences, which a hostile judge would imaginatively and prospectively ascribe to the indicted literature, as the natural consequences of the act of the accused person.

Ingersoll failed to see another thing. In proposing to punish a man for having an evil intention, independent of any actual and material injury having flowed from it, he too was getting back to the evil basis of all persecution, namely a proposal to punish the mere psychologic crime of having an evil state of mind which had actually injured no one. That Ingersoll should have been guilty of this does not speak well for his intellect. Of this proposition I shall have more to say later on.

### LIBERALS ON THE RIGHT TO ADVOCATE CRIME.

I soon saw that the Constitutions made no exception for any particular class of intellectual "evils," but protected them all alike, so long as the mere utterance of one's sentiments was the only factor involved. Thus, the advocate of crime might be punished as an accessory before the fact if a crime actually resulted from his advocacy, but could not be punished for his utterance, merely as such. Upon this proposition several of my radical friends took more or less definite issue with me. Mr. Edwin C. Walker, who usually sees very clearly in such matters, yet failed to see the importance of a precedent allowing one exception to unabridged freedom,

wrote the following words:

"Even to argue for the right or alleged right to advocate the performance of criminal acts, on the ground that without unrestricted freedom for such advocacy of invasion the right to liberty of expression is denied, is to sacrifice essential substance to empty form. * * * * * *What may or may not be a theoretical right in the premises is relatively unimportant; what is important, is the fact that to insist that we have such a right* is to menace and cripple our defensible right of expression, to seriously limit, if not destroy, our opportunity to teach and persuade. It is enough for us to affirm the right and benefit of the utmost freedom for the discussion of all suggested peaceful changes in belief and society, and to keep it ever before all the authorities that in the long run their tenure of office depends far more on non-interference with even the most incendiary utterance than on suppression of that utterance."[20]

A century ago, when a similar argument was made for the unimportance of a little tax levied for the support of a particular church, Dr. Priestly made the answer that "A penny of a tax is a trifle, but a power imposing that tax is never considered as a trifle, because it may imply absolute servitude in all who submit to it." The few who may care to exercise the right to advocate what everybody else admits an evil may be relatively unimportant, but the power to suppress them merely on account of a speech the evil tendency of which is only speculatively, prospectively, and imaginatively ascertained, is the admission of a power to enslave the mind of all, and upon all subjects. Our Constitutions make no distinction.

Mr. Walker is very much interested in the question of freedom for sex-discussion. I can best show the evil of his admitting the power to suppress any mere expression of opinion by quoting an address made before the National Purity Federation by the

[20] Liberty and Assassination, by E. C. Walker. (Italics are mine. T. S.)

Rev. Charles Carverno. He said:

"Let us look at a case that is somewhat plain. The police of this city will break up a gathering and prohibit speeches whose intent, or evident tendency, is to excite to acts of Anarchy. Why should not the same attitude be observed and the same action taken when a play is put on the boards whose tendency is to cultivate indifference to sex crime? There is sex Anarchy as well as political or civic Anarchy. It is as important that society be protected against the one as against the other. The family, and that too predominately monogamic, is older than the State —it is the MORE basic condition and relation."[21] Thus do Mr. Walker's chickens come home to roost, if I may adapt that homely proverb. We need to learn the solidarity of all liberty.

Mr. Louis Post, who edits the best American newspaper devoted to fundamental democracy, attacks my argument more directly. He said: "To us it seems that the man who so advises another to commit a crime as to make himself an accessory before the fact, if the crime be actually committed, should be criminally liable though the crime be not committed." * * * "If it be destructive of freedom of speech to punish advocacy of crime when the crime advocated does not result, then it must be destructive of freedom of speech to punish advocacy of crime when the crime advocated does result. * * * Without the criminal intent, of course they should not be [punished]. But with the criminal intent, why not punish, whether the intended injury occurs or not?"[22]

ON PUNISHING UNDESIRABLE STATES OF MIND.

Like Ingersoll, in the case of "obscenity," Post, in the case of advocacy of crime, would punish a mere undesirable state of mind, although no actual or material injury to any one has actually resulted therefrom. According to my way of thinking, this proposition implies the uttermost limit of outrage

[21] *The Light*, Nov. 1906, p. 236.

[22] *The Public*, May 15, 1908, pp. 147-148.

upon liberty of conscience. If there exists a power which can punish any mere psychologic "crime," I see no reason why it may not punish every other psychologic offense, for then no limit exists which ignorance, passion, or idiosyncrasy need respect.

Montesquieu tells us of a case of inquisition to discover, and punish, a man for having an unpopular state of mind. He says: "Marsyas dreamed that he had cut Dionysius's throat. Dionysius put him to death, pretending that he would never have dreamed of such a thing by night if he had not thought it by day. This was a most tyrannical action, for though it had been the subject of his thoughts, he had made no attempt toward it. The laws do not take upon them to punish any but overt acts."[23] This inference as to a "criminal" state of mind was no less logical than those which usually underlie the determination of criminal intent. It was as proper to punish that unpopular state of mind, or desire, as though it had been ascertained by other evidence.

But that was in Greece about fifteen hundred years ago, and yet substantially the same thing occurred only a few centuries ago, though the "undesirable" state of mind was revealed in a little different manner. Fabian, in his Chronicle, tells us of a Welshman "drawen, hanged, and quartered for prophesying of the kyng his Majesties death."[24] But why not, if any mere state of mind, unaccompanied by actual injury, can be made a subject of criminal punishment?

If it be crime to try to inculcate an unpopular idea in others, then certainly it should be a crime to possess that same undesirable state of mind. In England one Peachman was found to possess an undelivered manuscript-sermon, with passages encouraging resistance to tyrants, and denunciatory of royalty. He had also denounced his Bishop. He was

[23] Spirits of the Laws, V. I., p. 232, Aldine edition.

[24] See end of Fabian's Chronicle, which he nameth the Concordance of Histories.

tortured into implicating others, probably falsely, was sentenced to death, but died in prison.[25] The few contemporary friends of liberty of conscience denounced this occurrence, but at present some professed friends of freedom endorse principles which, carried to their logical conclusion, justify this outrage. The danger and the outrage of such matters lie in admitting the existence of a power to punish mere psychologic offences, and not in the mere manner of its exercise.

If under obscenity laws we may punish the expression, or promotion in others, of an undesirable state of mind, why not punish the existence of such an undesirable state of mind even before verbal expression? Why wait until the harm of publicity is achieved? Then why not establish inquisitions to discover the existence of such undesirable states of mind and punish them? If it be a crime to disseminate "obscene" literature, because of its alleged tendency to stimulate lewd thoughts and lascivious feelings, and the imaginary danger of these, then we should also penalize the possession of lewd thoughts and lascivious feeling. Are our moralists for revenue and their "liberal" abettors willing to carry their doctrine to this logical conclusion, and to establish inquisitions, not only as against "obscene" books, but "obscene" minds, and to prescribe and enforce a penalty for every lewd thought or lascivious feeling entertained by themselves?

We already compel immigrants to disclose their mental condition, and if they have that undesirable state of mind known as non-resistant Anarchism we punish them, by denying them admittance to the United States. If we admit the existence of a power to punish any mere state of mind, any mere psychologic offense, entirely separate from any actual injury to any one, then it becomes a mere matter of

[25] Lord Campbell's Life of Bacon, Vol. 3, pp. 62-66; Erskine's Speeches, Vol. 1, p. 254. But see also Dixon's Personal History of Lord Bacon, pp. 224 to 240.

legislative discretion to determine what states of mind shall be punishable, and a mere matter of judicial speculation how the existence of the prohibited state of mind shall be discovered, or proven. I cannot agree with these radical friends that such a power either ought to be, or is vested in any body of American legislators. In this matter I prefer to stand with those eminent and conservative gentlemen whom I shall now quote in support of my own contention. These are some of the conservative friends of *unabridged* freedom of utterance as a matter of acknowledged natural right.

LORD MACAULAY.

"The true distinction [between persecution and punishment] is perfectly obvious. To punish a man because he has committed a crime, or is believed, though unjustly, to have committed a crime is not persecution. To punish a man because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrines with him, that he will commit a crime, is persecution; and is, in every case, foolish and wicked. * * *

"Let it pass, however, that every Catholic in the kingdom thought that Elizabeth might be lawfully murdered. Still the old maxim, that what is the the business of everybody is the business of nobody, is particularly likely to hold good in a case in which a cruel death is the almost inevitable consequence of making any attempt."[26]

"It is altogether impossible to reason from the opinions which a man professes to his feelings and his actions and in fact no person is such a fool as to reason thus, except when he wants a pretext for persecuting his neighbors. * * * It was in this way that our ancestors reasoned, and that some people in our own time still reason about the Catholics. A Papist believes himself bound to obey the pope. The pope has issued a bull deposing Queen Elizabeth. There-

[26] Macaulay's "Hallam's Constitutional History."

fore, every Papist is a traitor. Therefore every Papist ought to be hanged, drawn, and quartered. To this logic we owe some of the most hateful laws that ever disgraced our history. Surely the answer lies on the surface. The church of Rome may have commanded them to do many things which they have never done. She enjoins her priests to observe strict purity. You are always taunting them with their licentiousness. * * * When we know that many of these people do not care enough for their religion to go without beef on a Friday for it, why should we think that they will run the risk of being racked and hanged for it?"[27]

A. J. WILLARD.

"The most general office of speech is to reproduce the thoughts and feelings of one in others. In this sense the liberty of speech is absolute, according to *the principles of the law.* It is impossible to conceive of an actionable wrong existing solely on the ground that one has attempted to impart his thoughts and feelings to another, unless some public law affords such remedy, or *unless such speech is accompanied by some action that is an aggression on the rights of another.* * * *

"It [speech] is a means of combining and constituting the common or mutual action of individuals, and, therefore, must be examined as among the means of performing such actions as depend upon cooperation. It would follow that, when an action is unlawful, speech used as a means to such end would partake of that unlawful character. This results from the fact that what is said, as well as what is done, may form a part of a transaction, and thus the lawful or unlawful character imputed to such transaction must affect all the elements of that transaction. Speech in this way may be part of the means of connecting the action of rioters or conspirators against governments. It may even point the nature and tendency of the actions which it accompanies, and

[27] Macaulay's "Civil Disabilities of the Jews."

thus become a means of conferring upon them the legal character of lawfulness or unlawfulness. * * *

"In all these cases, even where the character of what is spoken determines the legal character of what is done, *it is the act alone that can convert the mere use of words into violations of right.* Again, speech may be used for purposes of deception, and in that case, as in the cases previously mentioned, *the act of wrong is not consummated by the speech alone, but by the action produced by the speech.*

"In the instance of slander, words uttered may be attended by consequences rendering them injurious to the right of character. *In these cases the wrong consits in what is actually or presumably done by individuals, by society at large, or by the community, as a consequence of words spoken;* the words in such a case being the cause of injurious consequences, are regarded as in themselves injurious."[28]

SIR LESLIE STEPHEN

"The doctrine of toleration requires a positive as well as a negative statement. It is not only wrong to burn a man on account of his creed, but it is right to encourage the open avowal and defense of every opinion sincerely maintained. Every man who says frankly and fully what he thinks, is so far doing a public service. We should be grateful to him for attacking most unsparingly our most cherished opinions. * * * Toleration, in fact, as I have understood it, is a necessary correlative to a respect for truthfulness. So far as we can lay it down as an absolute principle that every man should be thoroughly trustworthy and therefore truthful, we are bound to respect every manifestation of truthfulness. * * *

"A man must not be punished for openly avowing any principles whatever. * * * Toleration implies that a man is to be allowed to profess and maintain any principles that he pleases; not that he should be allowed in all cases to act upon his principles,

[28] "The Law of Personal Rights," pp. 349-351 by Willard. (Italics are mine. T. S.)

especially to act upon them to the injury of others. No limitation whatever need be put upon this principle in the case supposed. I, for one, am fully prepared to listen to any arguments for the propriety of theft or murder, or if it be possible, of immorality in the abstract. No doctrine, however well established, should be protected from discussion. The reasons have been already assigned. If, as a matter of fact, any appreciable number of persons are so inclined to advocate murder on principle, I should wish them to state their opinions openly and fearlessly, because I should think that the shortest way of exploding the principle and of ascertaining the true causes of such a perversion of moral sentiment. Such a state of things implies the existence of evils which cannot be really cured till their cause is known, and the shortest way to discover the cause is to give a hearing to the alleged reasons."[29]

I will quote another who, though not to be classified as a conservative, was yet conservative enough to be elected to the English Parliament. In America he would have been denounced as an "undesirable citizen" and treated as an object of suspicion.

AUBERON HERBERT.

"Of all the miserable, unprofitable, inglorious wars in the world [the worst] is the war against words. Let men say just what they like. Let them propose to cut every throat and burn every house—if so they like it. We have nothing to do with a man's words or a man's thoughts, except to put against them better words or better thoughts, and so to win in the great moral and intellectual duel that is always going on, and on which all progress depends."[30]

[29] Sir Leslie Stephen, on "The Suppression of Poisonous Opinions," published in *The Nineteenth Century*, March and April, 1883. (If memory serves me right, Leslie Stephen was educated as a clergyman, but became an Agnostic, and was knighted after this utterance. But as to these matters I may be wrong. T. S.)

[30] Auberon Herbert, *Westminster Gazette*, Nov. 22, 1893.

I think I have made it plain that there are scientists and other thoughtful persons who believe in freedom of utterance as an unabridgable right, while some professing radicals believe in it only as an abridgable liberty—by permission. In this respect I am quite willing to be classed with these conservative non-liberals.[31]

[31] For a more elaborate defense of my views on the precise point here involved see "The Historical Interpretation of Unabridged Freedom of Speech," in *Central Law Journal*, through March, 1910. This essay has been printed in pamphlet by the Free Speech League. It also constitutes chapter XI of "Obscene Literature and Constitutional Law."

## VII

# OUR PROGRESSIVE DESPOTISM

AS I view history, the evolution of organized government toward liberty, especially in its relation to laws which are penal in character, is clearly divided into three general classes of tendency. The first of these manifests itself in the effort to restrain autocratic sovereigns and their minions in the arbitrariness of their power to punish, by subjecting their wills and penalties to the authority of prior known rules or laws. The second step in this evolution toward liberty is to curtail the authority of the law-making power as to the manner of its exercise, so that it may not, even under the forms of law, violate that natural justice which requires uniformity of the law in its application to all those who in the nature of things are similarly situated, which uniformity, of course, is impossible unless the law is certain in the definition of what is prohibited. The third tendency is marked by the curtailment of the legislative power as to subject matter of its control, so as to conserve a larger human liberty by excluding certain conduct —and progressively an increasing quantum thereof —from all possible governmental regulation, even by general, uniform, and certain laws. This should later limit legislation to the prohibition of only such conduct as in the nature of things necessarily, immediately and directly involves an invasion of the liberty of another, to his material and ascertainable injury. I have no doubt it was such a government, of limited power to regulate human affairs, that the framers of American constitutions intended to establish.

The first stage of the evolution above indicated we generally term a lawless government of men, in contradistinction to a government by men according to law, and such a government is always despotic and arbitrary, although it may at times be a relatively benevolent despotism. The second stage means a government by men according to prior established rules, which rules may be as invasive and unjust as the legislative power sees fit to make them. This condition is aptly described as tyranny by the law, of which we find many examples all around us. The third stage wherein the legislative power is limited to the suppression of acts which are necessarily, directly and immediately invasive, is aptly termed liberty under law. Our present stage of evolution, so far as the leaders of libertarian thought are concerned, is probably to be located near the beginnings of this third stage, and in the course of a few thousands of years we may attain to something approximating real liberty under the law; and in another million of years we may attain to the anarchist's ideal, which is liberty without state-enforced law, made possible because no one has the inclination to invade his neighbor, and all are agreed as to what constitutes an invasion. The great mass of Americans, and humans generally, are now in that stage of their development which compels a love of tyranny under the forms of law, a tyranny tempered only by the discretion of the ignorant, such as know nothing of liberty in the sense of an acknowledged claim of right to remain exempt from invasive authority.

The transition from absolutism to government by law, in its earlier stages is marked by the misleading seemings of law, which, however, are devoid of all its essence. This is illustrated in many of the mis-called laws of the Russian Tsar, and also in the Chinese code, which latter prescribes penalties for all those who shall be found guilty of "improper conduct," without supplying any further criterion or test of guilt. Manifestly under such authority the magis-

trates are authorized to punish anything which whim, caprice, or malice might prompt them to adjudge "improper." Accordingly, we have a state of affairs wherein, under the misleading appearances of law, everything is condemned, and the arbitrary will of the officers of the State again create the criteria of guilt and determine the penalty, instead of merely enforcing "the law" as they find it. Thus, while observing the outward forms and seemings of law, the people are still governed by the mere despotic wills of officials.

The Supreme Court of the United States has put its seal of condemnation upon such tyranny, in the following words: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative part of the government."[1]

In our postal laws is a statute penalizing the transmission by mail of *obscene, indecent* or *filthy* literature, art, etc. No standard of judgment by which to determine guilt is furnished in the statute, and, as with the Chinese code, anything is "improper conduct" which the arbitrary will of the magistrate may choose to include. So with us everything is "indecent" or "filthy" which through whim, caprice, malice, or sex-superstition may tempt the judge to a vengeful ire, or which the Postmaster-general may elect to exclude from the mail. That particular phase of despotic power is so old, and the average "intelligent" American slave has become so accustomed to it, that the very arbitrariness of this power is accepted as part of his conception of "liberty."

However, a new scope has been added to this tyranny. As a part of the same statute against "obscenity", it is provided that, "every article or thing designed or intended for the prevention of conception

[1] U. S. vs. Reese, 92 U. S. 221.

or procuring of abortion *and every article or thing intended or adapted for any indecent or immoral use,"* and any information sent through the mail telling where any of these may be had, shall be punished.

Repeated futile efforts have been made to induce the courts to construe "indecent" so as include irreligious literature. An effort is now on foot to make blasphemy unmailable by express statute. Some State statutes have been amended so as to include "filthy or disgusting" books, etc., under the ban. By recent amendment our postal laws also interdict "filthy" communications, without informing us by what criteria ideas are to be adjudged "filthy." Again, in the case of Vanni, the effort was made to have the court punish blasphemy as "filthy." Again the effort failed, the court holding that these statutory words must be construed together, and thus construed all imply a sexual significance. So also, the statutory words *"every article or thing* intended or adapted for any indecent or immoral use," must be applied only to immorality of the same general class as "obscenity."

Early in 1908 the postmaster at Paterson, N.J., held up the anarchist paper *La Questione Sociale* pending instructions from Washington as to its exclusion. President Roosevelt ordered the paper excluded from the mails and, under date April 9th, 1908, sent a message to Congress asking for more legislation on the subject and appending the official opinion of Mr. Bonaparte, his Attorney-general, on the legality of what Mr. Roosevelt had done in relation to *La Questione Sociale.*

In this opinion the Attorney-general says: "I cannot advise you that the section above quoted authorizes either the prosecution of the persons mailing the paper in question, or its exclusion from the mails." After much argument to justify his reluctance at coming to such a conclusion Mr. Bonaparte adds this: "There is another aspect of the question. To determine whether those responsible for such a publication

have legal right to their transportation in the mail, it may be material to determine whether they would have any adequate remedy if refused such transportation." This question the Attorney-general answers in the negative and of course it was possible to cite judicial precedent [2] as can always be done in support of every tyranny.

So then, simply because of his confidence that courts would refuse to give any relief, he concludes that lawful power exists, but without lawful authority. After having said: "I cannot advise you that the section above quoted [the only statute at all related to the subject] authorizes either the prosecution of the persons mailing the paper in question or its exclusion from the mails," the Attorney-general adds: "While therefore in the absence of any express provision of law or binding adjudication on this precise point, the question is certainly one of doubt and difficulty, I advise you that, in my opinion, the *postmaster will be justified in excluding from the mails any issue of any periodicals,* otherwise entitled to the privilege of second class mail matter, *which shall contain any article constituting a seditious libel* and counselling such crimes as murder, arson, riot, and treason."

Of course, in determining what constitutes "seditious libel" one would be compelled to go back to the old pre-revolutionary English cases. Under the criteria of seditious libel thus established, with all their uncertainty to invite a lawless discretion on the part of the Postmaster-general, some issue of every "Progressive" journal in America probably could be excluded from the mails.

Mr. Roosevelt thereupon sent one of his characteristic messages to the Congress. Upon the opinion of the Attorney-general, which had said that no express provision of law or binding adjudication upon the precise point existed, Mr. Roosevelt stated that "Under this opinion I hold that existing *statutes give the*

[2] Commerford v. Thompson, 1 Fed. Rep. 422.

[3] Senate Document No. 426, Sixtieth Congress, First Session.

*President the power to prohibit the Postmaster-general* from being used as an instrument in the commission of crime," including verbal or constructive "treason." Of course he is only characterizing the transmission by mail of anarchist literature. Although he says existing "statutes" give him the power, he demands further legislation and he secured a part of it. His message concludes with these excited words. "The anarchist is the enemy of humanity, the enemy of all mankind, and his is a deeper degree of criminality than any other. * * * No paper here or abroad should be permitted circulation in this country if it propagates anarchistic opinons."

Those who may care to measure the intelligence of Mr. Roosevelt's conception of our constitutional guarantee for freedom of the press, should apply his recommendation to the *Hibbert Journal,* for July, 1910, wherein is contained a very illuminating article on "The Message of Anarchy" by Jethro Brown, Professor of Law in the University of Adelaide.[4] Had Mr. Roosevelt's recommendation been adopted by Congress, not only would the eminently respectable and conservative *Hibbert Journal* have been suppressed, but under the common-law rule as to seditious libel, many papers printing Mr. Roosevelt's later speeches could also be excluded from the mails. Mr. Roosevelt probably knows what he wants when he demands that all be excluded from the mails, which at common-law was designated as "seditious libel." For those who are less intelligent about seditious libel than Mr. Roosevelt and Mr. Bonaparte, let me quote a reminder or two to show what ideas were punishable under the common-law, so we may know what ideas Mr. Roosevelt wants power to suppress.

"If any man should not be called to account for possessing the people with *an ill opinion of government,* no government can subsist. *Nothing can be worse to any government than to endeavor to procure*

[4] This fine statement of the anarchist's case is republished by The Hillacre Book House, Riverside, Conn. for 25c.

*animosities as to the management of it. This has been always looked upon as a crime,* and no government can be safe unless it be punished." Again: "It is no new doctrine, that if a publication be calculated to alienate the affections of the people, by *bringing the government into disesteem,* whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the Law. It is a crime; it has ever been considered as a crime, whether wrapt in one form or another." [5]

"And here he [Holt] adduces several precedents of persons indicted and executed for words held to be treasonable; one of them during the reign of Henry the Sixth, and three in the reign of Edward the Fourth, about as reasonable and just as that of the innkeeper, who was executed during the same reign, for saying jestingly, that he would make his own son heir to the Crown; or as that of the gentleman whose favorite buck the king had killed, and who was also executed in the same reign, for wishing it, horns and all, not in the king's belly, but in the belly of those who had counselled the king to kill it." [6] This is the despotic rule which Mr. Roosevelt, by the message quoted, says he desires to restore to these United States.

It is most extraordinary, in our country, where a few people still profess to believe in liberty, that this Rooseveltian usurpation of censorial power, and his demand for its enlargement, did not provoke a single conspicuous rebuke from any important person. We have forgotten, or what is nearer correct, even among the most intelligent ones, few ever knew this: "Well therefore and in the highest spirit of philosophy, did Montesquieu say that the Roman Republic was overthrown, not as is commonly supposed by the ambition

[5] Per Lord Ellenborough, R. v Cobbet, reported in Holt on Libels A. D. 1804. Reproduced from The Law of Libel, by Mence, 1824, pp. 193 to 194.

[6] Reproduced from "The Law of Libel" by Richard Mence, 1824, p. 173.

of Ceasar and Pompey, *but by that state of things which made the success of their ambitions possible.*" The people of this "Republic" are now in a state of indifference and ignorance concerning liberty, such as invites an overthrow and abandonment of all that remains of liberty and democracy, to wit, its forms and pretenses.

But some will say: "There still remain those 'bulwarks of liberty,' the courts!" Why not appeal to the courts to uphold the constitutional guarantees, and thus their own reputation? But is it really worth while? Have we any reason to believe them to possess any more enlightened view of constitutional liberty than a clerk under the Postmaster-general? Cite the precedents already established, you say? But why? Do the precedents promote liberty? Even if they did would they be followed in a case presenting emotional difficulties to "his honor"? When deeply moved with the *awful word "Anarchism"* right before them could the judges possibly see the application of libertarian precedents? Appeal to the Constitution, which in their official oath they swore to uphold? But why? I ask again! Will not the judges be emotionally so disturbed as quite to dethrone their reason, when a real live anarchist is at the bar of "Justice"? I wish I could believe it were not so. Maybe they could still avoid "knowing because they feel, and being firmly convinced because strongly agitated." I am no prophet; I cannot tell, but I do remember that Alexander Hamilton argued that it was useless to place a guarantee of freedom of the press in our Constitutions, because, as he said: "Who can give it a definition which would not leave the utmost latitude for invasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declaration may be inserted in any constitution respecting it, must altogether depend on public opinion and on the general spirit of the people, and of the government." [7] I fear that as to the last proposition

[7] The Federalist p. 536, Ed. 1818.

he is right because our judicial history abundantly shows that courts have destroyed and evaded the constitutional guarantee of freedom of speech and of the press,[8] and how hopeless it is to expect it to be otherwise especially in the face of many evidences pointing to such intellectual bankruptcy of our courts and judges, as incapacitates them for critical thinking in the face of an epidemic of respectable hysteria infecting the judges themselves.

The road and fate of despotism are ever the same. With "the best of motives" and general acquiescence, there come gradual accretions of power, by small usurpations on the part of those entrusted with authority, and thus the masses become habituated to slavish submission and the authorities to the enforcement of lawless power, thus paving the road to an enshrined tyranny. Because we fail to see the potency of seemingly insignificant precedents of evil import, no single encroachment upon liberty, considered alone, ever seems worthy of great effort to destroy. Ultimately the established precedents justify the greater invasions and the aggregate of these tyrannies becomes unbearable. Then comes the revolution by violence; a partial abrogation of tyranny; a change in method of selecting the tyrant, and the same eternal round is re-enacted. America is travelling fast toward the ultimate despotism and its violent overthrow. Shall we continue to travel in this road? It is not too late to retrace our steps toward liberty and justice through light. Unfortunately, there is no one at present in evidence who combines adequate foresight, political influence, and the moral courage successfully to lead the way to an enlarged and an enlightened individualism, with freedom of speech and of the press as its foundation. Let us hope that such a person will appear and when he appears let us be zealous to give him support.

[8] "Obscene" Literature and Constitutional Law, chapter 10 on "The Judicial Dogmatism on Freedom of the Press."

# INTELLECTUAL HOSPITALITY

BY THEODORE SCHROEDER.

To have some intelligent appreciation of how much of the knowable is yet unknown, conduces to that humility which is the beginning of wisdom. To know something of the past struggles for human progress conduces to an appreciation of how little is probably true of what we think we know. Thus to see our attainments in their true relations to past beliefs and their probable relation to future knowledge conduces to a true measure of our great ignorance. To have this is to be without censure, because without a stupid pride. To love truth more than our vain predispositions; to love harmlessness of life more than moral sentimentalism; to be free from phariseeism, because knowing the diversity and uncertainty of standards; to be unafraid of new evidence, and unoppressive toward new allegations of truth; to be controlled by a selfishness of so high an order, that your greatest happiness comes from studying all problems from the impersonal viewpoint, and making all judgments by impersonal standards; to have the desire *to be right* always overpowering the desire that others *esteem* us to be so; never to impose one's opinion by invasive force; [illegible] to be impatient, except, perhaps with dogmatism and intolerance —this is the essence of intellectual hospitality. In addition to this, if you show that rare disposition to make a substantial sacrifice for defending the right to be heard, of those whose opinions you disapprove, you would have a virtue so rare as to be almost heroic.